Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit sitting *en banc* entered on July 8, 1974. The judgment reversed the order of the District Court for the District of New Jersey which dismissed respondent's complaint and denied his application for a preliminary injunction.

The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to conduct an evidentiary hearing and set forth its conclusions in the form of a declaratory judgment.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit sitting *en banc* has not yet been reported and appears in the Appendix (A5, *et seq.*). The prior opinion of the three judge panel of the Court of Appeals for the Third Circuit has not yet been published and appears in the Appendix (A43, *et seq.*). The oral opinion of the District Court for the District of New Jersey dismissing respondent's complaint and denying preliminary injunctive relief also appears in the Appendix (A61, *et seq.*).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. A three judge panel of the Court of Appeals for the Third Circuit thereafter reversed the District Court's order on September 10, 1973. On September 21, 1973, the Court of Appeals granted petitioners' application for a rehearing. Subsequently, the Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at petitioners' request, consented to a consideration of the matter *en banc.*

The judgment in lieu of a formal mandate was issued by the Court of Appeals for the Third Circuit *en banc* on July 8, 1974. Petitioners' application for a recall of the mandate was granted on July 23, 1974. Issuance of the mandate was stayed until August 7, 1974, to permit petitioners to file this petition for a writ of certiorari.

Questions Presented

1. Whether the "extraordinary circumstances" exception to the *Younger* v. *Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution in the absence of an allegation of "harassment" or "bad faith"?

2. Whether the New Jersey Supreme Court's inquiry into respondent's intention to continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities constituted such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution?

3. Whether federal intervention in a pending state criminal prosecution was permissible where the courts of the State of New Jersey were fully capable of fairly adjudicating respondent's constitutional claims?

4. Whether the Fifth Amendment privilege against self-incrimination is violated where lawful governmental processes have the unintended effect of overbearing an individual's will and causing him to testify?

5. Whether federal intervention was permissible to enjoin a pending state criminal prosecution on charges of false swearing on the ground that allegedly compelled testimony formed the basis for the criminal prosecution?

6. Whether federal intervention in a pending state criminal prosecution was permissible to resolve factual disputes in advance of constitutional necessity in the absence of an allegation of great, immediate and irreparable injury?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution. . . ."

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

Constitution of the United States, Amendment XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 1:

> "The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court. In case the Chief Justice is absent or unable to serve the presiding Justice designated in accordance with rules of the Supreme Court shall serve temporarily in his stead."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 2:

> "The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 3:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1 Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

> "2A-1B-3. Institution of removal proceedings
>
> A proceeding for removal may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5:

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6:

"2A:1B-6. Preparation of defense; counsel; production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7:

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting *en banc*, or before three justices or judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2A:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9:

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10:

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant to Article VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

N.J.S.A. 2A:131-4:

> "2A:131-4. False swearing; offense stated
>
> Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable for a misdemeanor."

New Jersey Rules of Evidence, Rule 8(3):

> "In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. . . ."

New Jersey Rules of Evidence, Rule 63(10):

> "A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution."

New Jersey Court Rules, R. 1:12-1:

> "Rule 1:12. Disqualification and Disability of Judges
>
> 1:12-1. Cause for Disqualification; On the Court's Motion
>
> The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he
>
> (a) is by blood or marriage the second cousin of or is more closely related to any party to the action;
>
> (b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits,
>
> (c) has been attorney of record or counsel in the action; or
>
> (d) has given his opinion upon a matter in question in the action; or
>
> (e) is interested in the event of the action; or
>
> (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.
>
> Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which he is a resident or liable to be taxed are or may be parties to the record or otherwise interested."

New Jersey Court Rules, R. 1:12-2:

> "1:12-2. Disqualification on Party's Motion
>
> Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

New Jersey Rules of Court, R. 1:12-3:

> "1:12-3. Proceedings in the Trial Courts in the Event of Disqualification or Inability
>
> (a) Before or After Trial; Designation. In the event of the disqualification or inability for any reason of a judge to hear any pending matter before or after trial, another judge of the court in which the matter is pending or a judge temporarily assigned to hear the matter shall be designated by the Chief Justice or by the Assignment Judge of the county where the matter is pending except that in the municipal court, the disqualified or disabled judge shall himself in writing designate the acting judge, subject to the Assignment Judge's approval, if the designee is not himself a judge of a municipal court.
>
> (b) During Trial. If a judge is prevented during a trial from continuing to preside therein, another judge may be designated, as provided in paragraph (a), to complete the trial as if he had presided from its commencement, provided, however, that he is able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof.
>
> (c) Disposition in the Interest of Justice. No substituted judge shall continue the trial in any matter

> pursuant to this rule unless he is satisfied, under the circumstances, that he can fairly discharge his duties, and if not so satisfied, he shall make such disposition as the circumstances warrant, as where trial has taken place, by ordering a new trial or, in a case tried without a jury, by directing the recall of any witness.

Statement of the Case

This is a petition for a writ of certiorari to review a decision rendered by the Court of Appeals for the Third Circuit sitting *en banc* reversing an order of the United States District Court dismissing respondent's complaint and denying his application for preliminary injunctive relief. Three judges dissented. The judgment issued in lieu of a formal mandate was recalled and stayed pending certiorari proceedings.

The material facts are not in dispute and are essentially a matter of official record. Respondent Helfant, a member of the New Jersey Bar and a former municipal court judge,[1] alleged in a verified complaint (see 18 U.S.C. §1343(3) and 42 U.S.C. §1983) that he was subpoenaed to appear before the State Grand Jury on October 18, 1972. The allegation under investigation by the grand jury concerned a criminal complaint for atrocious assault and battery upon two victims lodged in a municipal court in which Judge Samuel Moore presided. Respondent allegedly represented one of the victims and

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[1] In New Jersey, municipal court judges may practice law and need not devote their full time to their official duties. See N.J.S.A. 2A:8-8 and R. 1:15-1(c). However, they may not practice in any "criminal, quasi-criminal or penal matter." R. 1:15-1(c).

caused the complaint to be filed against one John Cantoni for the purpose of extracting money from him. The charge of atrocious assault and battery being an indictable offense,[2] the municipal court had no jurisdiction to hear the matter,[3] and could dismiss the complaint only with the consent of the County Prosecutor. Nevertheless, the complaint was dismissed without the Prosecutor's knowledge, after Cantoni paid an intermediary $1,500, plus an additional $200 allegedly for Judge Moore.

Pursuant to the subpoena, respondent appeared before the State Grand Jury on October 18, 1972, and was advised that he was the target of an investigation.[4] Armed with that information and pursuant to his attorney's advice, respondent invoked his Fifth Amendment privilege against self-incrimination and refused to testify. Nevertheless, respondent Helfant's appearance before the grand jury and his possible involvement in the pending investigation received some public notoriety and was dis-

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[2] N.J.S.A. 2A:90-1.

[3] In New Jersey, municipal court judges have jurisdiction to conduct probable cause hearings. If probable cause is found to exist, the defendant is "bound over" to await final determination of the cause. R. 3:4-3.

[4] Unlike many jurisdictions, New Jersey case law provides that a witness who is a target of a grand jury inquiry must be apprised of that fact. See, *e.g.*, *In re Addonizio*, 53 N. J. 107, 117, 248 A.2d 531, 536 (1968); *In re Boiardo*, 34 N. J. 599, 604-06, 170 A. 2d 816, 818-20 (1961); *State* v. *DeCola*, 33 N. J. 335, 350-52, 164 A. 2d 729, 736-37 (1960). When a witness is thus a target, no more need appear to support his Fifth Amendment claim. *In re Addonizio*, *supra*, at 117, 248 A. 2d at 536; *State* v. *Fary*, 19 N. J. 431, 438-39, 117 A. 2d 499, 503-04 (1955).

closed in several newspapers in the State. When the news account appeared, the Administrative Director of the Courts in accordance with settled practice informed the Supreme Court. The Administrative Director was then instructed to obtain a report from the Deputy Attorney General handling the matter and all relevant grand jury testimony.[5] The material was obtained and it revealed in substance the allegations against Judge Helfant and Judge Moore recounted above.

In the meantime, it had become apparent that the grand jury's investigation encompassed other matters in which respondent was involved. Shortly after his initial appearance, respondent was again subpoenaed to testify before the grand jury at 10:00 A.M. on November 8, 1972. The Supreme Court had scheduled oral arguments on pending appeals for that date. Thus, the Court directed the Administrative Director to ask both Judge Helfant and Judge Moore to meet with it at its private conference room on that day. The purpose of this meeting was to discuss with the two judges whether they should sit pending resolution of the grand jury investigation. Both of them appeared as requested and each met separately with the Court. Both Judge Helfant and Judge Moore agreed not to sit in their respective courts until the completion of the grand jury investigation and the resolution of any charges which might emerge.[6] Their agreement not to sit obviated the need to consider whether formal proceed-

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[5] Under New Jersey law, grand jury minutes are in the exclusive custody of the judiciary. See, *e.g.*, *In re Jeck*, 26 N. J. Super. 514, 98 A. 2d 319 (App. Div. 1953).

[6] In his testimony before the United States District Court, Helfant said: "I am a municipal court judge in two municipalities but I have taken a voluntary leave of absence from both judgeships."

ings should be instituted for their interim suspension. Although no order of their suspension was entered, the records of the courts show that neither man sat in his official capacity following the meeting of November 8, 1972.

The federal complaint filed by Helfant alleged isolated incidents with respect to the meeting with the Supreme Court, but did not attempt to indicate their context. More precisely, respondent did not reveal the purpose of the meeting so that its significance could be evaluated. Candor required of one who seeks equitable relief surely demanded that Helfant either disclose the stated purpose or allege that none was revealed if it be so claimed. Yet, although respondent alleged that when he was asked to meet with the Court, he tried unsuccessfully to learn from the Administrative Director the purpose of the meeting, he did not allege that he was not so advised by the Supreme Court. Nevertheless, that he was told that the purpose was to discuss whether he should continue to sit pending the disposition of the charges is inferable from the allegation in the complaint that Chief Justice Weintraub said the Court was not interested in hearing from Helfant the merits of the underlying controversy.

In any event, according to the allegations in the complaint, respondent was ushered into the Supreme Court's conference room where all of the justices were assembled. Chief Justice Weintraub inquired of respondent whether he thought it proper for a judge sitting in criminal cases to invoke the Fifth Amendment privilege against self-incrimination.[7] This was followed by a question pro-

[7] Chief Justice Weintraub has since retired as have two other justices who were present at the conference. Thus, only four of the seven justices who were present at the conference with Helfant are presently members of the Supreme Court.

pounded by Justice Mark A. Sullivan as to whether respondent had continued to preside following his invocation of the Fifth Amendment. Justice Sullivan also asked whether respondent felt it appropriate to adjudicate the rights of others when he had refused to testify regarding his own activities.

Although respondent's complaint alleged that both Chief Justice Weintraub and Justice Sullivan inquired into his prior assertion of the Fifth Amendment, he did not allege that any member of the Court suggested that he testify or offered any promise or threat if he did or did not testify. The Fifth Amendment was not the focus of the meeting. Judge Moore, who had already testified freely before the grand jury, and Judge Helfant who had not, were dealt with in precisely the same fashion. Both agreed not to sit. Nor did respondent ask to be relieved of that agreement after he testified before the grand jury, thus making it evident that nothing turned upon whether he chose to speak or be silent. Thus, respondent said in an affidavit annexed to the complaint, "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

The complaint referred to other questions concerning Helfant's association with one Abe Schusterman, a State's witness who had previously appeared before the grand jury. The focus of this inquiry related to allegations that Helfant and Schusterman had bribed an Atlantic County Court judge in a criminal case. As previously noted, Chief Justice Wientraub cautioned respondent not to discuss the merits of the Attorney General's investigation. The import of the Chief Justice's remarks was that he was solely concerned with respondent's ability to

continue to actively serve as a municipal court judge during the pendency of the grand jury investigation. Resonent informed the Court that he intended to cooperate with the grand jury and to testify. Helfant alleged in his complaint that petitioner, Joseph Hayden, who was conducting the grand jury investigation, entered the Supreme Court chambers as he was leaving.

Immediately following this conference, respondent proceeded to the grand jury room where he waived his Fifth Amendment privilege and responded to questioning. According to the complaint, Helfant was "emotionally upset" by virtue of his prior confrontation with the Supreme Court justices and testified only because he feared that he would otherwise be removed from office and disbarred. As previously noted, he admitted, however, that none of the justices had threatened to take disciplinary action against him unless he waived his Fifth Amendment privilege. In any event, the import of respondent's testimony was wholly exculpatory. Nevertheless, the grand jury subsequently returned an indictment charging respondent with conspiracy to obstruct justice (N.J.S.A. 2A:98-1), obstruction of justice (N.J.S.A. 2A:85-1), compounding a felony (N.J.S.A. 2A:97-1) and four counts of false swearing (N.J.S.A. 2A:131-4).

Based upon these allegations, respondent sought a preliminary and a permanent injunction enjoining the Attorney General and others from prosecution of the indictment. Respondent's request was grounded upon his conclusory allegation of collusion between the Supreme Court and the Attorney General's Office. The Supreme Court's interest in the outcome of his case, according to Helfant, prevented him from having his constitutional claims fairly adjudicated in the State system and precluded the possibility of a fair trial.

Petitioners moved pursuant to Rule 12(b)(6), *Fed. R. Civ. P.*, to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court thereafter conducted an evidentiary hearing with respect to respondent's motion for a preliminary injunction. Following respondent's presentation of evidence, the district court denied injunctive relief and dismissed the complaint for failure to state a claim. Noting that federal intervention was impermissible under the guidelines of *Younger* v. *Harris,* 401 U. S. 37 (1971), the court concluded that the prosecution was not instituted in bad faith or for the purpose of harassment and that respondent was not threatened with immediate or irreparable injury. Significantly, the district court found that respondent's constitutional claim could properly be adjudicated by the New Jersey judiciary. Specifically, the district court concluded that the involvement of members of the New Jersey Supreme Court in respondent's disciplinary proceedings did not impair their ability to fairly consider the merits of the pending criminal prosecution. Further, the court was unwilling to presume that other members of New Jersey's judiciary would be infected by the Supreme Court's alleged interest in respondent's case. The court thus found it unnecessary to resolve the issue of whether respondent's testimony before the grand jury was the product of his free and unconstrained will.

A three judge panel of the Court of Appeals reversed the district court's order on September 10, 1973, and remanded for further proceedings. Citing the inability of the New Jersey Supreme Court to impartially resolve respondent's constitutional claim, the order dismissing the complaint and denying respondent's application for injunctive relief was vacated. The case was remanded to the district court for a hearing on respondent's motion for a preliminary injunction, and for a trial on

the merits. The court's conclusion was bottomed upon an assumption that the Supreme Court's prior involvement in respondent's case prevented the State courts from resolving the issues raised. Lacking a forum in the State courts, the Court concluded that respondent's allegation of coercion could only be decided by the federal judiciary.

Petitioners thereafter petitioned the Court of Appeals to recall its mandate and applied for rehearing suggesting that the matter be heard *en banc*. See Rules 35 and 40, *Fed R. App. P.* Because of the significant federal-state comity questions raised in petitioners' application, the full Court of Appeals subsequently agreed to hear the case *en banc*. On July 8, 1974, the Court reversed the district court's order, three judges dissenting. Although rejecting respondent's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for "a determination of whether [respondent's] testimony before the grand jury" was coerced. In reaching this conclusion, the majority opinion did not distinguish between the substantive offenses and the false swearing charges contained in the indictment. Presumably, the Court concluded that a finding of "involuntariness" by the district court would preclude the prosecution of respondent for false swearing and would prevent the State from introducing the alleged tainted testimony at trial. In any event, the court directed the district court to conduct an evidentiary hearing and to set forth its conclusions in the form of a declaratory judgment. This petition followed.

Summary of Argument

The Court of Appeals' *en banc* decision tears at the very roots of "Our federalism." Its effect is to paralyze the administration of a state judicial system and disrupt its criminal processes. At stake is the prerogative of a state to administer effectively its laws. It goes without saying, federal interference of this magnitude is inherently abrasive. *Younger* v. *Harris,* 401 U. S. 37 (1971).

This case presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically, at issue is whether the "extraordinary circumstances" exception to the *Younger* interdiction was intended to establish a distinct category justifying federal intervention in a pending state criminal prosecution, or to be merely descriptive of the traditional standards of "bad faith" or "harassment." This Court has never delineated the contours of the "extraordinary circumstances" exception and scattered statements seem to indicate doubt on the part of some justices that such a distinct class exists. See, *e.g.,* Mr. Justice Black's opinion in *Perez* v. *Ledesma,* 401 U. S. 82, 85 (1971) and Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U. S. ——, ——, 42 *U.S.L.W.* 4736, 4745-4749 (1974). If a separate category exists at all, it must be equated with the unavailability of a state forum for vindication of the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93.

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state criminal prosecution. On this basis alone, the issues raised in this petition are highly significant and

are worthy of this Court's review. Assuming the existence of such a separate category, the majority grievously erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Alternatively, if the majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activities. It is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey,* Article 6, Section 2, paragraph 3; N.J.S.A. 2A:1B-1 *et seq.* The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a proper forum for vindication of respondent's constitutional claims.

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard,* 342 U. S. 117 (1951); *Fenner* v. *Boykin,* 271 U. S. 240 (1926).

Federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey,* 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence,* 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an in-

tegral part of the doctrine of federal non-intrusion. Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded upon solely conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. There is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona,* 384 U. S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process. *Id.* at 467.

Even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *Bryson* v. *United States,* 396 U. S. 64 (1969); *Dennis* v. *United States,* 384 U. S. 855 (1966); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). Assuming coercion, the compulsion is not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

With respect to the substantive charges, it is to be emphasized that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution,

and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for even significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 U.S.C. §2254(d). Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy." (A37). Substantial interests of federalism are thus sacrificed not in

the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity. It is respectfully submitted that these significant issues require this Court's review.

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court's inquiry into whether respondent should continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities did not constitute such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution.

A. Introduction.

This case epitomizes the ever-increasing tension between the state and federal courts. At stake is the traditional power of the state judiciary to effectively administer the criminal law, and to ensure the integrity of its bench and bar. That authority has been placed in jeopardy by virtue of respondent's conclusory allegation that members of the Supreme Court of New Jersey will, at some future time, refuse to obey the law they are constitutionally bound to enforce. Based upon that allegation, the Court of Appeals ordered the district court to conduct an evidentiary hearing and to determine whether the Supreme Court's inquiry into whether respondent should sit pending resolution of the grand jury investigation, conducted pursuant to its constitutional mandate, violated his Fifth Amendment privilege against self-incrimination. Suffice it to say, the Court of Appeals' decision is, in and of itself, an unwarranted interference with the efficient operation of the

State's judiciary.[8] Its conclusion, standing alone, is inherently abrasive and has an enormous impact on the entire State judicial system, for it seriously impairs the independence of the New Jersey Supreme Court and threatens its ability to faithfully discharge its constitutional obligations.

The court below itself recognized the significance of the "federal-state comity questions" presented in this case (A7). It sought to minimize the precedential value of its decision, however, noting that "the operative facts" were peculiar to the State of New Jersey, where its Constitution vests in the Chief Justice and the State's highest court the total and complete administrative control over the entire judicial system (A22). The court further observed that the factual allegations contained in respondent's complaint were *sui generis* and in all likelihood would not recur (A22). The Court thus characterized the impact of its holding as "miniscule" and foresaw no future cases receiving much "precedential nourishment" from its opinion (A23).

Petitioners are constrained to disagree. Even were the court correct in its assumption that New Jersey's judicial system is indigenous to that State,[9] the injury

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[8] Pursuant to the Court of Appeals' remand, respondent has subpoenaed members of the New Jersey Supreme Court to testify at the district court hearing.

[9] The incidence of such constitutional provisions is not, in fact, limited to New Jersey. Eight states vest plenary administrative authority over judicial officers in the Chief Justice of the state's highest court: *Alaska, Const., Art.* IV, §16; *Arizona, Const., Art.* 6, §3; *Colorado Const., Art* VI, §5(2); *Delaware Const., Art.* 4, §13; *Florida, Const., Arts.* 2 and 5; *Hawaii, Const.,*

(*Footnote continued on following page*)

would be no less acute because it affects but one of fifty jurisdictions. Nor was the court correct in assuming that the factual pattern which emerged in this case might not be a recurring one. In New Jersey, the Supreme Court is duty-bound to inquire into allegations of judicial misconduct; and these investigations do not generally await the conclusion of pending and related criminal charges.[10] Simply stated, there exists a strong likelihood of continued federal intervention. The majority opinion thus sets an unwholesome and dangerous precedent which warrants this Court's review.

(*Footnote continued from preceding page*)

Art. 5, §5; *Illinois, Const. Art.* 6, §16; *Oklahoma, Const.* VII, §6. Nine states vest in the Chief Justice the power to temporarily assign or transfer at will subordinate judicial officers to any court within the state system: *Alaska, Const., Art.* IV, §16; *Colorado, Const., Art.* VI, §5(3); *Florida, Const., Art.* 5, §12; *Illinois, Const., Art.* 6, §16; *Missouri, Const., Art.* V, §6; *North Carolina Const. Art.* IV, §9; *Pennsylvania, Const. Art.* V, §15 (limited to assignment of retired judges); *Washington Const., Art.* IV, §2(a). The Oregon Constitution authorizes such transfers but requires enacting legislation. *Oreg. Const., Art.* VII, §2(a). The Arizona provision is similar to New Jersey's and is not limited to temporary assignments. *Arizona Const., Art.* VI, §3. Ten state constitutions provide for direct Supreme Court involvement in removal, suspension and disciplinary proceedings against judicial officers: *Alabama Const., Art.* VII, §§173, 174; *Alaska Const., Arts.* 4 and 10 (see also A. S. §22.30,070); *California Const., Art.* VI, §§16, 106; *Colorado Const., Art.* VI, §23; *Delaware Const., Art.* IV, §37; *Florida Const., Art.* V, §12; *Indiana Const., Arts.* 4 and 7; *Kansas Const., Arts.* 3 and 15; *Louisiana Const., Art.* IX, §§1, 5; *Texas Const., Art.* XV, §6

[10] The court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a related criminal case. Actual prosecution of ethics charges, however, generally does not commence until the criminal prosecution has run its course.

The decision below erodes longstanding principles of comity and federalism. It is well settled that our federal system contemplates a policy which permits state courts to try criminal cases free from interference by the federal judiciary. *Younger* v. *Harris,* 401 U. S. 37, 46 (1971). Many and varied considerations support this well-recognized doctrine. Basic to the rule is the principle that courts of equity should not restrain a criminal prosecution where an adequate remedy at law exists and no irreparable injury would obtain. Within the bounds of the Constitution, limited federal equitable jurisdiction prevents "erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the [federal] rights asserted." *Id.* at 44. Vital among the considerations determinative of equitable jurisdiction is the concept of comity, "that is, a proper respect for state functions. . . ."[11] *Id.* at 45. In essence, an accused should be compelled to rely upon his defenses in the state courts, *"unless it plainly appears that [this] course would not afford adequate protection."* *Fenner* v. *Boykin,* 271 U. S. 240, 244 (1926) (emphasis added). See also *Samuels* v. *Mackell,* 401 U. S. 66, 72 (1971). Stated another way, "a pending state proceeding, in all but unusual cases . . . provide[s] the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . . ." *Steffel* v. *Thompson,* —— U. S. ——, 42 *U.S.L.W.* 4357, 4360 (1974). Thus, apart from the traditional prerequisite to obtaining an injunction, *i.e.,* irreparable injury, the "fundamental policy against federal interference with state criminal prosecutions requires the additional showing that the irreparable harm be both great and immediate." *Younger* v. *Harris, supra* at 46. "[T]he threat to the plaintiffs' federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 47. In short, there must be an allegation that the state prosecution was undertaken in bad faith or for purposes of harassment, or that "other unusual circumstances" exist which would justify federal interference, and that the constitutional harm sought to be averted is both "great and immediate." *Id.* at 54. See also *Perez* v. *Ledesma,* 401 U. S. 82, 85 (1971).

[11] The policy against federal interference with state functions is deeply rooted in our history. It bears repeating that our union was established by thirteen uneasy states fearful of national encroachment upon their independence. The national government received an assigned role dependent upon specific constitutional authorization. All else was reserved to the states. As noted in Judge Adams' dissenting opinion, the first formal expression of the "*Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued 'to stay proceedings in any court of a state.' " (A 24-25). See 1 Stat. 335, the forebearer of 28 U.S.C. §2283. Although suits entertained under the Civil Rights Act form an exception to the proscription contained in the anti-injunction statute (see *Mitchum* v. *Foster,* 407 U. S. 225 (1972)), section 2283 represents a long standing public policy against federal interference in state proceedings.

B. The "Extraordinary Circumstances" Requirement.

Perhaps the single most salient feature of this case is that the prosecution of respondent "grew out of an ongoing State Grand Jury [i]nvestigation into alleged acts of misconduct initiated prior to the incidents" alleged in the complaint (A62). It is conceded that neither bad faith nor harassment were present in Helfant's prosecution.[12] Nevertheless, the majority concluded that the New

[12] "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma supra* at 85. Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid.* See also *Dombrowski* v. *Pfister,* 380 U. S. 481, 486, 490 (1965).

Jersey Supreme Court's disciplinary investigation which immediately preceded respondent's appearance before the grand jury constituted such "extraordinary circumstances" as to compel federal intervention in a pending state criminal prosecution (A20). This case thus presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris*, *supra*. Specifically, at issue is whether the "extraordinary circumstances" exception to *Younger's* interdiction was intended to establish a distinct category justifying federal intervention, or whether this Court intended the phrase to be merely descriptive of the traditional standards of "bad faith" or "harassment." In any event, this Court has never delineated the contours of the "extraordinary circumstances" exception. As noted in the dissenting opinion, "scattered statements by the Court seem to indicate doubt on the part of some of the justices that any such exception exists at all" (A34). See, *e.g.*, Mr. Justice Black's opinion in *Perez* v. *Ledesma*, *supra* at 85. See also Chief Justice Burger's opinion in *Allee* v. *Medrano*, —— U. S. ——, 42 *U.S.L.W.* 4736, 4745-4749 (1974).

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state prosecution. On this basis alone, this Court should review the decision below. Even assuming the existence of such a category, however, the court erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the Supreme Court, such grounds manifestly do not warrant federal intervention. Plainly, the federal question is whether the State courts provide a proper forum for resolution of respondent's claim. In petitioners' view, the "extraordinary circumstances" finding of the majority must be predicated on the claim that the State judicial system could not vindicate respondent's federal constitutional rights. Assuming that the New Jersey courts are capable of fairly adjudicating the issues relating to respondent's guilt or innocence, the federal inquiry ends. The mere appearance of impropriety does not present a federal question.

Distilled to its essence, the majority opinion adopted respondent's contention that "the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire State court system in processing his constitutional claim." (A15). The majority opinion is thus premised upon the astounding presumption that the entire State judiciary would in some vague way be infected by virtue of the Supreme Court's inquiry whether respondent should continue to preside pending resolution of the grand jury investigation. More shocking, however, is the unwarranted conclusion that this presumption of predisposition exists without any consideration of the motivation of the State Supreme Court in conducting its conference with respondent. Even if respondent's will was overborne and he was thus "coerced into testifying," there can be no presumption of partiality or bias absent a showing of some malevolent intent on the part of the members of the Supreme Court. Succinctly stated, respondent's complaint is barren of any allegation supporting the assumption entertained by the majority that the State courts do not provide an effective forum for resolution of the constitutional claims asserted here.

Plainly, there was nothing ominous in the Supreme Court's conference with respondent. New Jersey's Con-

stitution[13] and statutory law[14] confer broad administrative responsibility on the Supreme Court to insure public confidence in the bar and the bench. The Chief Justice serves as the "administrative head" of the court system and assigns and transfers members of the judiciary to the various divisions and parts. *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. As a matter of state practice, all disciplinary actions are initiated and supervised by the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Moreover, removal or suspension of a member of the judiciary lies in the sole province of the Supreme Court. See, *e.g.,* N. J. S. A. 2A:1B-3; N. J. S. A. 2A:1B-7; N. J. S. A. 2A:1B-9. And significantly, "the Constitution [and statutory law] place the administrative control of

[13] The New Jersey Constitution vests in the Chief Justice the power to temporarily assign Superior Court judges to the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 1. The Supreme Court has jurisdiction "over admission to the practice of law and the discipline of persons admitted." *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. In addition, the Supreme Court makes rules governing practice and procedure and exercises appellate jurisdiction "in the last resort in all causes provided in [the] Constitution." *Constitution of New Jersey,* Article 6, Section 2, paragraphs 2 and 3.

[14] The constitutional authority to discipline, suspend or remove members of the judiciary is supplemented in statutory provisions. The Supreme Court may institute removal proceedings "on its own motion." N.J.S.A. 2A:1B-3. Removal may be based upon "misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2A:1B-2. The Attorney General is to prosecute proceedings for removal. N.J.S.A. 2A:1B-5. In all instances, the defending judge has the right to counsel, compulsory process and other constitutional protections guaranteed by the Fourteenth Amendment. See, *e.g.* N.J.S.A. 2A:1B-6, 7, 8 and 9.

the municipal court in the Supreme Court and the Chief Justice." See *Kagan* v. *Caroselli,* 30 N. J. 371, 379, 153 A. 2d 17, 21 (1959). See also *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Thus, the Supreme Court "is charged with responsibility for the overall performance of the judicial branch. . ." and this broad grant of authority includes the "power reasonably necessary" to fulfill its constitutional and statutory obligations. *In re Mattera,* 34 N. J. 259, 264, 168 A. 2d. 38, 45 (1961). See also *State* v. *DeStasio,* 49 N. J. 247, 253, 229 A. 2d. 636, 639 (1967), *cert.* denied 389 U. S. 830 (1967).

The mere fact that it is incumbent on the New Jersey Supreme Court to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Certainly, a judicially disciplined mind is able to remain impartial. *Cf. American Trial Lawyers Ass'n* v. *New Jersey Supreme Court,* 409 U. S. 467 (1973). See also *United States* v. *Grinnell Corp.,* 384 U. S. 582, 583 (1966); *Napolitano* v. *Ward,* 457 F. 2d. 279, 282 (7th Cir. 1972); *DeVita* v. *Sills,* 422 F. 2d. 1172 (3d Cir. 1970). Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the entire State judicial system is morally and ethically bankrupt.

The Supreme Court's obligation to the bench, the bar and the public, grounded in the State Constitution and statutory law, cannot await formal indictment, trial and conviction. See *DeVita* v. *Sills, supra.* The Court's obligation to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. While these inquiries may

serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed.

Here, for example, allegations of abuse of office had been publicly aired, and it was incumbent upon the State Supreme Court to determine whether respondent intended to preside in his official capacity during the pendency of the Attorney General's investigation. As is evident from its inquiry, the Court's concern was focused upon its fear that public respect and confidence in the judicial process would be diminished by virtue of respondent's continued participation as a judge during the pendency of a grand jury inquiry into his own activity. In his complaint respondent alleged no intent on the part of the Supreme Court to affect the grand jury proceedings, or to compel him to testify. Nor does the fact that the conference occurred immediately prior to the respondent's scheduled appearance before the grand jury support an inference of any interest on the part of the members of the Supreme Court in the outcome of the Attorney General's criminal investigation.

The majority below recognized the importance of maintaining both the appearance and fact of judicial integrity[15] (A20). The Court further alluded to the well recognized policy of judicial restraint based upon "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) (A18). Parodoxically, the Court concluded that both objectives could best be advanced by federal

[15] Quoting Lord Herschell, the majority noted "[i]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they are geting it" (A 20). See R. Pound, "Mechanical jurisprudence," 8 *Colum. L. Rev.* 605, 606 (1928).

intervention in a criminal prosecution pending in the State court (A21). According to the majority, "[s]uch limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the 'brooding omnipresence' of the New Jersey Supreme Court" (A21).

Despite the majority's assertions to the contrary, the decision below in no way serves the interests of comity. Rather, it connotes a lack of confidence in the State judiciary. The majority opinion is predicated upon an assumption that members of the Supreme Court (1) will be predisposed against respondent, (2) that they will not disqualify themselves pursuant to settled New Jersey practice, (3) that they will utilize their broad administrative powers to coerce other State court judges, and (4) that the entire State judiciary will be intimidated by their interest in the outcome of the case. This far-fetched scenario taxes one's credulity.

C. The "Great and Immediate" Harm Requirement.

We now turn to the second requirement of *Younger* v. *Harris, supra;* namely that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Id.* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional percepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey*, 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence*, 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Prin-

ciples of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise line that separates the jurisdiction of the two co-equal judiciaries. It bears repeating that our national Constitution calls for judicial parallelism and not federal paramountcy. That is not to denigrate the federal judiciary's responsibility to protect and to safeguard the constitutional rights of our citizens. Plainly, the federal judiciary is supreme and the state judicial system is subordinate in resolving federal constitutional questions. But there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded upon solely conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. We submit that there is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. As such, the complaint fails to set forth any constitutional injury, much less one that is both "great and immediate." But even if there is a triable issue as to coercion, there is no basis to say

that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. Hence, a finding of coercion would not affect trial on those counts in the indictment charging Helfant with false swearing. Further, since respondent's testimony before the grand jury was not incriminatory, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, Helfant has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

1. Justiciability of the Coercion Issue.

The judgment of the Court below requires the district court to determine whether respondent's "testimony before the State Grand Jury, given on November 8, 1972, was the product of a free and unconstrained will" (A4). Petitioners take it to be evident that the issue is not whether Helfant's "will" not to testify was overcome by official inquiry into his criminal involvement, or the consequences which might lawfully ensue if he chose not to speak. What must be shown, rather, is that Helfant was "coerced" by the New Jersey Supreme Court by virtue

of some unlawful act or unconscionable promise. Surely, one who decides to testify before a grand jury or a petit jury, in the hope that he will not be indicted or convicted, cannot say his Fifth Amendment privilege was denied because the State was pursuing him in accordance with the discharge of its duty to enforce the criminal law. Nor can it be said that every judge and every lawyer who chooses to testify can assert that his free will was overcome because the Supreme Court of the State holds the responsibility to remove, suspend or disbar. Nor would the judge's or the lawyer's position be strengthened if he added his belief that the justices of the Supreme Court would privately regret a plea of the Fifth Amendment by an individual so situated. Nor could the claim be given efficacy by a gratuitous fear that the members of the State Supreme Court would surreptitiously or corruptly impose some penalty in violation of their oaths of office.

The essence of a claim that a waiver was involuntary is not that the individual was persuaded by circumstances to conclude that the less onerous course was to speak, but rather that government extorted the waiver by some misbehavior. Clearly, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. It would be extraordinary indeed to say that such an allegation creates a basis for federal interference with removal or disbarment proceedings.

In his complaint respondent alleges that he was asked to meet with the Supreme Court. There is nothing inherently wrong in that procedure. As pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the

misbehavior of judges and attorneys. The Court's duty to preserve the appearances and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. See *De Vita* v. *Sills, supra.*[16]

It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. And, although the complaint charges communications between the Supreme Court and the Deputy Attorney General handling the grand jury investigation, there is nothing evil or extraordinary in this procedure. Such communications are routine whenever the question of the fitness of a judge (or a lawyer) comes to the attention of the Court. Surely the complaint adds nothing of legal moment when it characterizes such communications as "collusive."[17]

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[16] In that case, the Court of Appeals for the Third Circuit recognized this obligation and approved the State mechanism for disciplinary matters. Yet, in the case now before this Court, the majority opinion below disavowed this conclusion, apparently determining the procedure to be inherently ominous. In the petitioners' view, the decision below has thus raised a constitutional question as to every disciplinary matter which coincidentally involves a criminal investigation or prosecution. The effect of the decision, in sum, is to preclude the State Supreme Court from exercising its constitutional responsibility.

[17] In New Jersey, the grand jury is an arm of the Superior Court, and responsibility for its administration lies with the judiciary. See *e.g., In re Jeck,* 26, N.J.Super. 514, 98 A.2d 319 (App. Div. 1953).

What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U. S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process.[18] *Id.* at 467.

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[18] The context of the Supreme Court's inquiry here was not facilitation of the criminal investigation but the protection of the judicial system from public ridicule. This undisputed fact is critical since the main purpose of the Fifth Amendment is to prevent overbearing by governmental agencies.

The desire to obtain a conviction can lead to overzealous activity and abuses of power. Through the Fifth Amendment, the framers of the Bill of Rights sought to avoid such abuses in the seeking of confessions. This purpose is made evident by an examination of the history behind the Fifth Amendment.

> "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. (citations omitted). Certainly anyone who reads accounts of those investigations . . . cannot help but be sensitive to the framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Michigan* v. *Tucker*, —— U. S. ——, ——, 94 S. Ct. 2357, 2361-62 (1974).

It is thus clear that the Fifth Amendment is meant to protect citizens against the use of unlawfully obtained evidence and to protect against governmental overreaching. It is to this latter consideration that this Court has most frequently turned its atten-

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tion. See *e.g., Michigan* v. *Tucker, supra; Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Jackson* v. *Denno*, 378 U. S. 368 (1964); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Rochin* v. *California*, 342 U. S. 165 (1952); *United States* v. *Carignan*, 342 U. S. 36 (1951).

The original common law rationale for the exclusion of involuntary confessions was that they were inherently untrustworthy. Thus, the voluntariness concept was strictly a principle of common law evidence based on the premise of exclusion of probably, or perhaps only possibly, untrue inculpatory statements which, by reason of their dramatic nature, are likely to have a decisive effect on the trier of facts. The underlying psychological basis of this ratoinale has been questioned for there is doubt whether there is a substantial danger of false confessions when coercion has been exerted. Professor McCormick perhaps the leading proponent of this contention arrives at this conclusion employing reasoning as follows:

> "If we revert, however, to our first inquiry as to whether the danger of false confessions is substantial enough, beyond the danger of untruth in out of court statements generally, to warrant the special rules restricting the admissibility of confessions the answer certainly cannot be a confident 'yes'. It may well be doubted whether confessions of guilt, even where they are extorted by pressure of force or fear, are not reasonably trustworthy . . . . Accordingly, it seems clear that while the policy on which all rules of competency are founded, the policy of safeguarding the trustworthiness of evidence admitted, has had an ancillary role in shaping the rules restricting the admission of confessions, the predominant motive of the courts has been that of protecting the citizen against the violation of his privilege of immunity from bodily manhandling by the police and from other undue pressures described [as] the third degree." McCormick, *Evidence*, §109, p. 229 (1954).

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For further authority supporting this thesis see McCormick, *The Scope of Privilege in the Law of Evidence,* 16 *Texas L. Rev.* 447, 451, 457 (1938); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 *Texas L. Rev.* 239, 245 (1946); Allen, "Due Process and State Criminal Procedures: Another Look," 43 *N. W. U. L. Rev.* 16, 19 (1953); Maguire, *Evidence of Guilt,* 109 (1959); Note, 63 *Michigan L. Rev.* 381 (1964); Note, 31 *U. Chi. L. Rev.* 313, 320 (1964).

In 1936, the voluntariness doctrine was raised to constitutional rank in the landmark case of *Brown* v. *Mississippi,* 297 U. S. 278 (1936), which held that it was a clear denial of due process guaranteed by the Fourteenth Amendment to admit into evidence a defendant's confession which had been tortured from him by State officials. The *Brown* Court reasoned that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which be at the base of all our civil and political institutions." *Id.* at 286. See also *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964). See cases collected in 3 Wigmore, *Evidence,* §820(D), p. 306, fn. 1 (*Chadbourn Rev.* 1970). The rationale of this constitutional doctrine does not relate to the trustworthiness or reliability of the statement as evidence. "[T]he reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne." *Jackson* v. *Denno,* 378 U. S. 368, 385 (1964).

In 1944 this Court decided *Ashcroft* v. *Tennessee,* 322 U. S. 143 (1944) and in every confession case since then (with one exception) the deterrence rationale has been the primary component in the Court's "complex of values" test. The exception was *Stein* v. *New York,* 346 U. S. 156 (1953) wherein this Court seemed to revert back to the trustworthiness rationale. "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."

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Id. at 192. This approach to the problem however proved to be short lived as a constitutional principle and its ultimate demise was foreshadowed eight years later when this Court decided *Rogers* v. *Richmond,* 365 U. S. 534 (1961). Justice Frankfurter, writing for the Court, spoke directly to the trustworthiness and deterrence concepts:

> "[C]onvictions following the admission into evidence of confessions which are involuntary, *i.e.,* the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial system and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth [citations]. To be sure, confessions cruelly extorted may be and may have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed." *Id.* at 540-541.

When this Court decided *Jackson* v. *Denno* three years later it rejected the premise that "the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession" and expressly overruled *Stein*. *Id.* at 383 and 391. In *Jackson* it was again made clear that the constitutional concept of voluntariness was rooted in the deterrence theory expounded in *Rogers,* and the concept was further explained later in the following words:

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Certainly, not every "compelling" influence leading to an individual's decision to testify violates the Fifth Amendment privilege. Numerous pressures necessarily come to bear on an individual whose activities are the subject of governmental investigation. The very fact of the investigation, or the apparent proofs adduced, may influence an individual to alter an intention to remain silent. So, too, that formal criminal charges may be imminent may well "compel" the "accused" to lay bare the details of his defense or to offer an explanation for his conduct. Suffice it to say, the resulting "compulsion" may spring from a wide variety of sources, including social, professional and familial pressures. The federal Constitution is not offended by the revelation of criminal conduct under such circumstances, or by a judgment that continued silence is not in the accused's best interest.[19]

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"It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' [citing *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960)] and because of 'the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U. S. 315, 320-321 (1959); *Jackson* v. *Denno*, *supra* at 385-386.

[19] Plainly, the issue "must be resolved in terms of balancing the public need on one hand, and the individual claims to constitutional protection on the other." See plurality opinion by Mr. Chief

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Justice Burger in *California* v. *Byers*, 402 U. S. 424, 427 (1971). As aptly stated by Mr. Justice Harlan:

> "If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Id.* at 453.

And as noted by a majority of this Court in *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him."

So too in *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970), this Court said:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."

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Similarly, in *McGautha* v. *California*, 402 U. S. 183, 213 (1971), against the backdrop of a contention that a unitary trial penalized a defendant who wanted to testify as to punishment but not as to the issue of guilt this Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments as to which course to follow. *McMann v. Richardson*, 397 U. S. (759) at 769, 90 S. Ct. (1441), at 1448, 25 L. Ed. 2d (763) at 772. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.
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> * * *
>
> "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.
>
> Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whe-

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Simply stated, there is no triable issue of coercion presented in this case. Helfant disavowed, under oath, any claim that any member of the Court directed him to waive the Fifth Amendment or made any threat in that regard. What remains, at most, is a fear that the justices would somehow be faithless to their constitutional duty, a fear unsupported by any allegation of impropriety. When the complaint is carefully scrutinized, no more emerges than that the New Jersey Supreme Court was acting in the good faith exercise of its constitutional responsibility. We submit on the basis of respondent's complaint, the issue of "coercion," *i.e.*, improper pressure on Helfant, is not raised. Surely, if some vestige of such a conclusory assertion is thought to be inferable, the supporting allegations are too flimsy to warrant federal intervention in a pending state prosecution by the extraordinary remedy of injunction. See *e.g.*, *Robinson* v. *McCorkle*, 462 F. 2d 111, 114 (3d Cir. 1972), *cert.* denied 499 U. S. 1042 (1972); *Coopersmith* v. *Supreme Court*, 465 F. 2d 993, 994 (10th Cir. 1972).

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> ther to stand on his motion or put on a defense with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

See discussion of these cases in *State* v. *Falco*, 60 N.J. 570, 292 A. 2d 23 (1972).

Distinguishable are such decisions as *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosse* v. *United States*, 390 U.S. 62 (1968), *Haynes* v. *United States*, 390 U.S. 85 (1968), *Leary* v. *United States*, 395 U.S. 6 (1969) and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). The holdings in all of these cases were based on the fact that the laws in question were directed at a class of persons who were suspected of criminal activity and whose compliance with the requisite statutes would immediately expose them to prosecution. The State's disciplinary procedures at issue here are not directed to those suspected of criminal activity and certainly are not designed to compel them to incriminate themselves.

2. *Effect of Coercion on the False Swearing Counts.*

The authorities overwhelmingly hold that the Fifth Amendment does not authorize perjury or false swearing, and hence it is no defense that a waiver of the Fifth Amendment privilege was coerced. We will presently discuss these authorities at length. We are at a loss, however, to understand the majority's handling of this issue. The dissenting opinion expressly agreed with our position. The majority opinion nevertheless was silent. We think it incomprehensible that the majority would silently decide that issue against the State; and this for two reasons. The first is that the majority could hardly ignore the wealth of authority laid before it. If it meant to disagree, it would surely say so and why. Secondly, since the dissenting opinion spoke directly to the issue, and at some length, the majority would be expected to say something about it. Yet, if we are correct, there is no discernible basis for interfering in any way with the trial of the false swearing counts. As we noted above, upon receiving the opinion, we sought to elicit the majority's position by moving to vacate the stay on the trial of the false swearing counts on the basis we have stated. Our motion was denied without any statement. We submit that there is no basis for a stay on those counts.

Even assuming that the Supreme Court's conference with respondent had the effect of coercing him into testifying, and that the State courts could somehow be considered incapable of adjudicating issues pertaining to this alleged "misconduct," the Court of Appeals was nevertheless in error in intervening in the pending prosecution for false swearing. Since the question of coercion is, as a matter of law, irrelevant to the issues to be considered at trial, it is equally apparent that such a claim could not affect or infect the "aura" of the State criminal proceedings. Conceding for the purpose of argument

the wholesale contamination of New Jersey's judiciary, respondent has suffered no direct injury which would support federal equitable relief. That is true because the issue of coercion need never be presented to the State judiciary.

In determining the impact of a coercion defense to an indictment charging false swearing it is relevant to examine the scope of the Fifth Amendment privilege. That Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. "[I]t does not . . . reach forward to protect against incrimination for future acts." *In re Baldinger,* 356 F. Supp. 153, 162 (C. D. Cal. 1973).[20] In no sense is Fifth Amendment protection extended to perjured testimony. The privilege "does not endow the person who testifies with with a license to commit perjury.[21] *Glickstein* v.

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[20] New Jersey law is in accord. See *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972); *State* v. *Williams,* 59 N. J. 493, 284 A.2d 272 (1971).

[21] Other courts both state and federal, have held that untruthful testimony is not protected by the Fifth Amendment privilege. See *United States* v. *Hockenberry,* 474 F. 2d. 247 (3d Cir. 1973); *United States ex rel. Annunziato* v. *Deegan,* 440 F. 2d 304 (2d Cir. 1971); *Robinson* v. *United States,* 401 F. 2d. 248, 251 (9th Cir. 1968); *United States* v. *Orta,* 253 F. 2d. 312, 314 (5th Cir. 1958), *cert.* denied 357 U. S. 905 (1958); *Claiborne* v. *United States,* 77 F. 2d. 682, 690 (8th Cir. 1935); *United States* v. *Provienzano,* 326 F. Supp. 1066, 1067 (E. D. Wis. 1971); *United States* v. *Ponti,* 257 F. Supp. 925 (E. D. Pa. 1966); *Moyer* v. *Brownell,* 137 F. Supp. 594, 605 (E. D. Pa. 1956); *United States* v. *Haas,* 126 F. Supp. 817 (E. D. N. Y. 1954); *United States* v.

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United States, 222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). Thus, in *Bryson* v. *United States,* 396 U. S. 64, 72 (1969), this Court characterized as unthinkable the "principle . . . [that] a citizen has a privilege to answer fraudulently a question that the government should not have asked." There, it was noted that our "legal system provides methods for challenging the government's right to ask questions" and that

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Miller, 80 F. Supp. 979 (E. D. Pa. 1948); *People* v. *Tomasello,* 21 N. Y. 2d. 143, 234 N. E. 2d. 190, 192-93 (Ct. App. 1967); *Cf. United States* v. *Wilcox,* 450 F. 2d. 1131, 1141 (5th Cir. 1971), *cert.* denied 405 U. S. 924 (1971); *Kronick* v. *United States,* 343 F. 2d. 436, 441 (9th Cir. 1965); *United States* v. *Parker,* 244 F. 2d. 682, 690 (7th Cir. 1957), *cert.* denied 355 U. S. 836 (1959); *United States* v. *Cason,* 39 F. Supp. 731, 734 (W. D. La. 1941); *Cf. United States* v. *Di Michele,* 375 F. 2d. 959, 960 (3d Cir. 1967). *Contra*: *People* v. *Allen,* 15 Mich. App. 387, 166 N. W. 2d. 664 (Ct. of App. 1968). In *Allen,* police officers were subpoened to testify before a judge who was conducting an investigation into police corruption. Defendants were advised of their constitutional right to remain silent but testified nevertheless. Subsequently, they were charged with perjury based upon their grand jury testimony. It was asserted that defendants believed that invoking their privilege would have led to suspension from the police department. The court held that "a statement given as a result of a coerced waiver of Fifth Amendment rights can [not] be the basis for a perjury prosecution" 166 N. W. 2d. at 669. However the court clearly misconstrued the Fifth Amendment protection afforded a defendant who utters a false statement, exculpatory on its face, before a grand jury. See discussion, *infra.* It is clear that the Fifth Amendment privilege pertains to past acts. Its inapplicability to perjury is equally clear. The court in *Allen* misconceived the function of the exclusionary rule, in disregarding the fact that defendants had been charged with perjury.

"lying is not one of them." *Ibid.* In *Kay* v. *United States,* 303 U. S. 1, 6 (1938), this Court noted that "when one undertakes to cheat the government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the government in which the effort to cheat or mislead is made are without constitutional sanction." And in *Dennis* v. *United States,* 384 U. S. 855, 867 (1966), this Court reiterated that basic principle, stating:

> "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, *he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction . . . Analogous are those cases in which prosecutions for perjury have been permitted despite the fact* that the trial at which the false testimony was elicited was upon an indictment stating no federal offense; (*United States* v. *Williams,* 341 U. S. 58, 65-69, 71 S. Ct. 595, 599-601, 95 L. Ed. 747); *that the testimony was before a grand jury alleged to have been tainted by governmental misconduct* (*United States* v. *Remington,* 208 F. 2d 567, 569 (C. A. 2d Cir. 1953), *cert.* denied, 347 U. S. 913, 74 S. Ct. 476, 98 L. Ed. (1969); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter,* 348 F. 2d 204, 208-210 (C. A. 2d Cir. 1965), *cert.* denied, 382 U. S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360, and cases cited herein). 384 U. S. at 866 . . . The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." (emphasis added) 384 U. S. at 867.

Cf. Acanfora v. *Montgomery City Board of Education,* —— U. S. ——, 42 *U.S.L.W.* 2439 (1974).

This well settled rule of law is deeply rooted in reason and applies with equal force in this case. Even assuming that respondent's will was overborne, the compulsion emanating from his conference with the Supreme Court was to testify truthfully, not falsely. Any other conclusion would reduce the witness' oath to a meaningless shibboleth. Moreover, assuming that respondent's waiver of his Fifth Amendment privilege was the product of his fear of removal from office or disbarment, that would not permit him to violate his oath and lie with impunity.

This Court has held that statements obtained during the course of disciplinary investigations under threat of dismissal from office cannot be used as evidence in a subsequent criminal prosecution. In *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), for example, this Court reversed the convictions of six New Jersey police officers who had testified before a grand jury after being advised of the then existing statute providing for job forfeiture upon refusal to testify. At trial, their grand jury testimony, which was highly inculpatory, was admitted against them as declarations against penal interest. In reversing, this Court concluded that dismissal from public employment under those circumstances exacted an unwarranted price for exercising the privilege. See also *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'r,* 392 U. S. 280 (1968); *Spevack* v. *Klein,* 385 U. S. 511 (1967).

Significantly, defendants in *Garrity* did not testify falsely before the grand jury. On the contrary, they testified truthfully, thereby incriminating themselves as to

past criminal misdeeds. Thus, this Court's holding in *Garrity* is in no way applicable to the facts here. Perhaps the most thorough analysis of the *Garrity* rationale as it affects the use of compelled but untruthful testimony can be found in *People* v. *Goldman,* 21 N. Y. 2d. 152, 287 N.Y.S. 2d 7, 234 N. E. 2d 194 (1967), appeal dismissed for want of substantial federal question, 392 U. S. 643 (1968), rehearing denied 393 U. S. 899 (1968). There, defendant, a police officer, was charged with perjury after he executed a limited waiver of immunity and testified before a grand jury. It was urged on appeal that said waiver was void because "it was extracted on pain of losing his job." 234 N. E. 2d at 195. The argument was also advanced, using *Garrity* as authority, that since the waiver was the product of coercion, the false grand jury testimony could not form the basis of a perjury indictment. Judge Breitel, writing for a unanimous court, initially reasoned that the scope of the Fifth Amendment protection does not immunize "one . . . from prosecution . . . for perjurious or contumacious testimony." *Id.* at 197. Then, applying the rationale of *Glickstein* v. *United States, supra,* the court analogized the situation to one in which a witness is granted immunity; although the testimony is unquestionably coerced, no insulation is afforded from prosecution, conviction or punishment for perjury. It thus concluded that Fifth Amendment protection does not extend to or license untruthful statements. The holding of *Goldman* is plain. Despite the "coerced" waiver of immunity and subsequent testimony, the witness "is not immune from penalties for crimes inherent in the giving of the testimony iteslf." *Id.* at 198. It is noteworthy, too, that this Court subsequently dismissed Goldman's appeal for lack of a substantial federal question.

Similarly, in *People* v. *Ricker,* 45 Ill. 2d 562, 262 N. E. 2d 456 (1970), defendant was convicted of perjury. There,

it was alleged that he had made contradictory statements before two grand juries. *Ricker* asserted that he had been threatened by his superiors with loss of his position as an attorney with the Metropolitan Sanitary District of Greater Chicago. As a public official, he could have been dismissed for refusing to waive his privilege against self-incrimination before the grand jury. The court recognized the mandate of *Garrity* that "[i]f he testified because he would otherwise have forfeited his public position, his testimony could not be used in a prosecution for a past crime." 262 N. E. 2d at 460. However, the court held:

> ". . . [W]hether the defendant was warned of his constitutional privilege, whether he properly signed his immunity waiver, or whether he could have been compelled to testify is beside the point. *He did testify, he testified falsely and he can be convicted of perjury.*" (emphasis added) 262 N. E. 2d at 461.

The Court in *Ricker* concluded that neither the Fifth Amendment nor *Garrity* was applicable since defendant had testified falsely before the grand jury. All conduct on the part of the Government, including the allegation of coercion, was disregarded. See also *People* v. *Genser,* 250 Cal. App. 2d. 351, 58 Cal. Rptr. 290 (1967).

Petitioners urge a similar treatment of the issue raised here. An individual who is compelled to appear and to testify before a grand jury is protected to the extent that his truthful testimony may not be used in a criminal proceeding against him. However, Helfant's perjurious misconduct before the grand jury must bar him, here, from asserting that alleged governmental impropriety "coerced" him to so testify. When respondent appeared before the grand jury he had not yet committed the crime for which

he is now indicted. His ". . . criminal liability concurred with the words he first uttered to the . . . Grand Jury." *United States* v. *Parker,* 244 F. 2d 943, 947 (7th Cir. 1957). Further, the four counts which charge false swearing were not "based upon evidence of past acts obtained from the mouth of the [respondent] in violation of Fifth Amendment rights. Instead, [they were] based on a crime whose very commission, rather than evidence of commission was the [respondent's] testimony." *United States* v. *Ponti,* 257 F. Supp. 925, 926 (E. D. Pa. 1966). When a witness chooses to testify untruthfully, he is simply not protected by the Fifth Amendment from a resulting prosecution. *United States* v. *Miller, supra.* See also *United States* v. *Daniels,* 461 F. 2d 1076, 1077 (5th Cir. 1972); *United States* v. *Manfredonia,* 414 F. 2d 760, 765, fn. 3 (2d Cir. 1969); *United States* v. *Remington,* 208 F. 2d 567, 569 (2d Cir. 1953), *cert.* denied 347 U. S. 913 (1953); *United States* v. *Parker,* 244 F. 2d 682, 690 (7th Cir. 1957), *cert.* denied 355 U. S. 836 (1959); *United States* v. *Winter,* 348 F. 2d 204, 208-209 (2d Cir. 1965), *cert. den.* 382 U. S. 955 (1965).[22] Thus, as the dissent properly points out, Helfant's testimony is admissible in evidence

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[22] As Wigmore wrote:

> "If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to testify truly; and the privilege by hypothesis would have been violated only if the witness had truly given self-incriminating evidence, but if he falsely exonerates himself, he has confessed no fact 'against himself,' hence his privilege has not been infringed by the actual answer even though it might have been by some other answer." *VIII Wigmore, Evidence* §2282, p.512 (McNaughton Rev. ed. 1961).

even assuming that it was coerced (A30).[23] Although the allegedly coerced testimony may not be used to establish respondent's commission of the substantive offenses, the State may use it to prove that he swore falsely.

3. The effect of Coercion on the Substantive offenses.

What has been said thus far relating to the nature of respondent's claimed "constitutional" deprivation applies with equal force with respect to the hypothetical injury which would result from trial on the pending substantive charges. Assuming that respondent was coerced into testifying, that standing alone is insufficient justification to bar prosecution. In short, respondent's complaint nowhere alleges that Helfant gave testimony which is incriminatory. The State has stipulated that it deemed his testimony to be exculpatory, and therefore did not intend to use those statements, except perhaps on cross-examination of respondent if he should depart from them. And, there is no allegation that Helfant intended to depart from his grand jury testimony. The dissenting judges below accordingly deemed the "coercion" issue wholly "conjectural," and unworthy of federal interference with the State's criminal process. We think the issue non-existent in the absence of an allegation of incrimination or some other prejudice in the defense to the criminal charges.

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[23] This argument was vigorously advanced by petitioners below. Nevertheless, the majority opinion is devoid of any reference to petitioners' argument. Following the rendition of the Court's judgment issued in lieu of a formal mandate, petitioners moved for a recall of the Court's order and for clarification. Specifically, petitioners asked the Court to clarify whether a finding of coercion would preclude prosecution of the false swearing charges. The Court denied petitioners' application.

It is beyond cavil that reception before a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment. See, *e.g.*, *United States* v. *Calandra*, —— U. S. ——, 42 *U.S.L.W.* 4104 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1966); *Holt* v. *United States*, 218 U. S. 24 (1910).[24] When a witness has been wrong-

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[24] *Gelbard* v. *United States*, 408 U.S. 41 (1972) is not to the contrary. In *Gelbard*, this Court was presented with the narrow question of whether a witness before a grand jury who was cited for civil contempt for refusal to answer questions she believed were based on illegal wiretap evidence, had standing under 18 U. S. C. §2515 to suppress the evidence. The decision according defendant standing was based exclusively on federal statutory grounds. Thus, the sole relevance of *Gelbard* to the instant matter is its reaffimance of the long standing rule that:

> "A defendant is not entitled to have his indictment dismissed before trial simply because the government acquired incriminating evidence in violation of the law, even if the tainted evidence was presented to the jury." *Id.* at 60.

One line of cases has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See *e.g. Goldberg* v. *United States*, 472 F. 2d. 513, 516 (2d Cir. 1973); *Jones* v. *United States*, 342 F. 2d. 863 (D. C. Cir. 1964); *United States* v. *Tane*, 329 F. 2d. 848 (2d Cir. 1964); *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), appeal dismissed *sub nom*; *United States* v. *Roth*, 208 F. 2d. 467 (2 Cir. 1953). For example, the court in *Goldberg* v. *United States, supra*, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to

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incriminating matters. The court applied the rationale of *Bruton* v. *United States*, 391 U. S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg* v. *United States*, *supra* at 516.

It is submitted that this Court's decision in *United States* v. *Calandra supra*, laid this debate to rest. But assuming that *Calandra* is not dispositive, the indictment in this case would not be subject to attack. It is settled that a mere appearance before a grand jury, albeit compelled, will not vitiate an indictment even if the witness asserts his privilege against self-incrimination. See *United States* v. *Wolfson*, 405 F. 2d. 779, 784-785 (2d Cir. 1968), *cert* den. 394 U. S. 946 (1969); *United States* v. *Winter*, *supra*, *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970); *United States* v. *Desapio*, 299 F. Supp. 436, 440 (S. D. N. Y. 1969). Clearly, then,a witness must incriminate himself (absent a valid waiver) before the same grand jury which indicts him to give rise to the claim that the indictment so obtained is based on coerced testimony. Indeed, if the utterances are not incriminatory, Fifth Amendment protection does not attach.

In his testimony before the grand jury, respondent vigorously denied all the facts material to the allegations against him. His testimony was entirely exculpatory and thus could not rationally have provided the basis for the indictment; nor indeed could it have served to corroborate the other, independent evidence already before the grand jury. So too, no "*Bruton*-type" problem could arise in this case. Compare *Goldberg* v. *United States*, *supra*. It is undoubtedly the other evidence—specifically the earlier testimony of two unindicted co-conspirators—upon which the Grand Jury relied in returning the first three counts of the indictment. This evidence, clearly competent and legally admissible, amply insulates the indictment against constitutional challenge. See *Costello* v. *United States*, *supra*. Respondent has thus suffered no prejudice by virtue of his "coerced testimony" before the grand jury. Therefore, the indictment must stand even if the rationale of the *Jones* and *Goldberg* line of cases is applied.

fully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use. *Kastigar* v. *United States*, 406 U. S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). It is equally clear that the "use" which is prohibited is the introduction of the "tainted" evidence at trial and not before a grand jury.[25] *United States* v. *Calandra*, *supra*. See also *United States* v. *Addonizio*, 313 F. Supp. 486, 494 (D. N. J. 1970). Thus, the majority was correct when it determined that there was no basis in law for an outright injunction against prosecution, for an injunction under these circumstances would have been tantamount to a dismissal of the indictment.

However, the Court of Appeals improperly concluded that a finding of coercion by the district court would support a declaratory judgment to the effect that the allegedly tainted evidence may not be introduced at respondent's trial. As noted in the dissenting opinion, "the edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the State will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing" (A29). This is an eventuality which has not yet arisen and indeed will in all probability never come to pass.

[25] New Jersey law is in accord. An indictment will not be vitiated merely because incompetent evidence was presented to the grand jury. See, *e.g. State* v. *Ferrante*, 111 N. J. Super. 99, 268 A. 2d 301 (App. Div. 1970); *State* v. *Garrison*, 130 N. J. L. 350, 33 A. 2d. 113 (Sup. Ct. 1943); *State* v. *Donovan*, 129 N. J. L. 478, 30 A. 2d. 421 (Sup. Ct. 1943); *State* v. *Ellenstein*, 121 N. J. L. 304, 2 A. 2d. 454 (Sup. Ct. 1938).

Adjudication of this issue by the federal courts is plainly premature and in advance of constitutional necessity. There is no indication that the Attorney General intends to utilize respondent's testimony in any way. As previously noted, at oral argument before the Court of Appeals, counsel for the State represented that Helfant's grand jury testimony will be used, if at all, only to impeach any inconsistent statement respondent might utter should he take the witness stand.[26] It becomes apparent that the constitutional injury sought to be averted by the majority is thus conjectural, depending for its very existence upon a hypothetical series of events that probably will never occur.

A deeply embedded principle of our jurisprudence precludes the resolution of abstract disputes in advance of

[26] At oral argument, counsel for New Jersey stated "[a]t this time there is no present intention of using that testimony. But were the [respondent] to take the stand, were his testimony to deviate in strong terms, that, testimony then, of course, under *Harris* v. *New York,* [401 U. S. 222 (1970)] might well be" [admissible to impeach his credibility.] That concession was not prompted by an excess of altruism on the part of the Attorney General. It would surely be poor trial strategy for the prosecution to seek to introduce respondent's exculpatory statements as substantive evidence. Indeed, Helfant's grand jury testimony would not qualify as a declaration against penal interest. Therefore, it would not be admissible under Rule 63 (10) of the *New Jersey Rules of Evidence.* So too, there is no authority which would support the admission of "compelled" statements to contradict a witness' trial testimony. *Cf. Harris* v. *New York, supra.* Nor would respondent's assertion of the defense of duress require the State courts to resolve the coercion issue. In New Jersey, the defense of duress would not be recognized under the facts here. *State* v. *Falco, supra; State* v. *Palmieri,* 93 N. J. L. 195, 199-200, 107 A. 407 (E. & A. 1919); 67 *Harv. L. Rev.* 1071-72 (1954).

constitutional necessity, hence the constitutional requirement of a case or controversy. *United States Constitution,* Article III, Section 2. *Flast* v. *Cohen,* 392 U. S. 83, 95-98 (1966); *United States* v. *Fruehauf,* 365 U. S. 146, 157 (1961); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1944); *Muskrat* v. *United States,* 219 U. S. 346, 348 (1911); C. Wright, *Federal Courts* 34 (2d ed. 1963). Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through the judicial process." *Flast* v. *Cohen, supra* at 95. Whether grounded in constitutional principle, see, *e.g. Commonwealth of Massachusetts* v. *Mellon,* 262 U. S. 447 (1923); *Fairchild* v. *Hughes,* 258 U. S. 126 (1922), or viewed as a mere policy limitation, see *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936), federal courts have long avoided passing prematurely on constitutional questions. Judicial authority may be invoked only when the interests of litigants require protection against actual and immediate interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing," "ripeness," and "mootness" which have evolved over the years are incidents of the primary concept that federal judicial power is to be exercised only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman,* 367 U. S. 497, 504 (1961). See also *O'Shea* v. *Littleton,* —— U. S. ——, 94 S. Ct. 669, 674 (1974); *Allee et al.* v. *Medrano, supra; Boyle* v. *Landry,* 401 U. S. 77 (1971). The same rule obtains whether the litigation concerns a challenge to the validity of a statute or the claimed denial of a constitutional right. *Cf. Cleary* v. *Bolger,* 371 U. S. 392, 402 (1963) (Goldberg, J., concurring).

These principles take on added significance when the federal courts are asked to interfere with a pending state prosecution. *Younger* v. *Harris, supra*. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial. As previously noted, a crucial aspect of *Younger's* limitation upon incursions into state proceedings is the necessity of a showing of "great and immediate" constitutional injury. *Id.* at 46. Absent this principle, "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of state courts by the federal forum . . . to determine the issue." *Stefanelli* v. *Minard, supra* at 117, 123-24 (1951). Further, this danger has become far more acute as our Constitution has been interpreted to embrace rights not previously thought to fall within its protection.

The majority's disregard of the "great and immediate" harm limitation thus emerges in sharp focus. More than a year and-a-half has passed since the grand jury returned the indictment charging respondent with crimes that allegedly occurred in 1968. During this time, New Jersey has been thwarted from proceeding with the prosecution. Significantly, one critical witness has died and other witness' memories have presumably dimmed. Respondent, who of course is presumed innocent until proven guilty, is seen in his old haunts undeterred and unaffected by the grand jury's finding of probable cause. To the public, this delay must appear unseemly. Surely, respect for the law is thereby diminished.

Nor is there any likelihood that this saga will come to an end in the near future. The court below has ordered a federal trial in the middle of state criminal proceedings in which respondent's challenge to the admissibility of evi-

dence is to be resolved. This lengthy disruption seems unsupportable since the prosecution has represented that the evidence sought to be suppressed will never be used. In any event, it would be erroneous to conclude that the district court's judgment will finally resolve the issue. That prospect appears remote since there is a strong possibility of other appeals from the fact-finding proceedings which are to be conducted pursuant to the court's mandate.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 *U.S.C.* §2254 (d).[27] Thus respondent is not without a federal forum for resolution of his constitutional claim.

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[27] 28 U. S. C. §2254(d) provides in part that in federal district courts, upon an application for habeas, prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2). . .the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6). . .the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7). . .the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy" (A37). Substantial interests of federalism are thus sacrificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity and tears at the very roots of "Our federalism." It is respectfully submitted that these significant issues require this Court's review.[28]

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[28] Petitioners are fully cognizant of the "interlocutory" status of this matter. In the usual case this Court will not grant certiorari to review a non-final judgment. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U. S. 327 (1968) and *Youngstown Sheet & Tube Co.* v. *Sayer*, 343 U. S. 577 (1952). But where there is a significant and obvious issue of law that is fundamental to the further conduct of the case, and that would otherwise qualify as a basis for certiorari, the order under attack may be reviewed despite its interlocutory status.

(Footnote continued on following page)

(Footnote continued from preceding page)

See *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685, fn. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734, fn. 2 (1947) and *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945). This doctrine has been held especially applicable to cases where, as here, the appealable issues are separable from and collateral to rights asserted in the action, and which are too important and independent of the cause itself to require that certiorari be deferred until the entire case is adjudicated. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949). See also *Stack* v. *Boyle*, 342 U. S. 1 (1951); *Roberts* v. *United States District Court*, 339 U. S. 844 (1949); *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684 (1949).

Immediate review of the issues raised by this petition is particularly appropriate. As previously noted, the Court of Appeals' decision is, in and of itself, an unjustifiable incursion into proper and traditional state functions. If the district court on remand finds in favor of petitioners, the acute injury resulting from the Court of Appeals' decision will not be abated. The dangerous precedent will stand. Thus this case falls within a "limited class. . .where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Nixon*, —— U. S. ——, ——, 42 U. S. L. W. 5237, 5240 (1974).

CONCLUSION

For the foregoing reasons, petitioners pray that their petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Petitioners.

DAVID S. BAIME,
Chief, Appellate Section,

ALFRED J. LUCIANI,
Deputy Attorneys General,
Division of Criminal Justice,
Of Counsel and on the Petition.

APPENDIX

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate, dated July 23, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Upon consideration of appellees' motion to Recall Judgment in Lieu of Formal mandate, and for certain other

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate, dated July 23, 1974

relief, and brief in support thereof, and appellant's brief in opposition thereto, all in the above entitled case,

By direction of the Court, it is ORDERED that this Court's certified judgment, issued in lieu of formal mandate on July 8, 1974, be, and hereby is recalled; and

It is Further Ordered that the issuance of the certified judgment in lieu of formal mandate be, and hereby is stayed until August 7, 1974.

For the Court,

THOMAS F. QUINN
Clerk

Dated: July 23, 1974

Certified Judgment in Lieu of Mandate, dated July 8, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN, PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and the STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which dismissed the complaint be, and the same is hereby reversed. The order entered May 9, 1973, denying the motion for a preliminary injunction is vacated and the cause is remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court, unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court.

ATTEST:

THOMAS F. QUINN
Clerk

July 8, 1974

Certified as a true copy and issued in lieu
of a formal mandate on July 8, 1974

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Copy

Opinion of the United States Court of Appeals for the Third Circuit, *En Banc*, dated July 8, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,
Appellant,

v.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDEN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR. and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.
(Civil Action No. 607-73)

Argued September 7, 1973
Submitted Under Third Circuit Rule 12(6)
November 19, 1973
Before: STALEY, ADAMS and GIBBONS, *Circuit Judges.*

Reargued April 10, 1974
Before: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed July 8, 1974)

Perskie & Callinan, Esqs.
By Marvin D. Perskie, Esq.
Patrick T. McGahn, Jr., Esq.
Wildwood, New Jersey
COUNSEL FOR APPELLANT

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Attorney General of New Jersey
Trenton, New Jersey
David S. Baime, Deputy Attorney General
Alfred J. Luciani, Deputy Attorney General
Edward C. Laird, Deputy Attorney General
COUNSEL FOR APPELLEES

ALDISERT, *Circuit Judge.*

Presenting a delicate question of federal-state comity, this appeal requires us to decide whether federal fact-finding should be utilized to determine whether a New Jersey municipal court judge's testimony before a state grand jury was the product of a free and unconstrained will. Contending that his Fifth Amendment rights as guaranteed by the Fourteenth Amendment will not be vindicated by the New Jersey state court system, appellant argues that the federal courts should provide relief because highly unusual circumstances dictate an exception to the familiar restrictive rule of *Younger v. Harris*, 401 U.S. 37 (1971).

I.

This is an appeal from an order of the district court which (1) denied plaintiff's request for a preliminary in-

junction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state,[1] and (2) granted the defendants' motion, under Rule 12(b)(6) F.R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, and made limited findings of fact. The appeal was argued before a panel of this court on September 7, 1973. Deeming the issues raised to be substantial, the trial on the challenged indictment being scheduled to commence on September 10, 1973, and the Attorney General of New Jersey declining to postpone it until the panel could decide the case, the panel entered an order enjoining the prosecution until such time as the appeal could be decided. Panel opinions were filed on September 10 reversing and remanding for further proceedings. Thereafter, representing that the State was willing to delay plaintiff's trial until disposition of the application for rehearing, the state attorney general petitioned for rehearing. Based on that representation, we recalled our mandate on September 21, 1973. Rehearing was granted before the panel; supplemental briefing was ordered on certain issues suggested by the appeal which had not been previously briefed or argued; and the panel subsequently granted some relief, one judge dissenting. Because of important federal-state comity questions, the full court subsequently agreed to hear the case in banc.

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1. The plaintiff was arraigned on the Indictment SGJ 10-72-10 on February 2, 1973. Trial was originally set for May 14, 1973.

The state's brief in support of its motion to dismiss in the district court discloses:

> Plaintiff herein, Edwin Helfant, stands charged in a nine count indictment handed up by the State Grand Jury charging him with conspiring with his codefendant, Samuel Moore, to obstruct justice, with obstructing justice in connection with his codefendant, Samuel Moore, with aiding and abetting compounding a crime and with four counts of false swearing. * * * All of the substantive offenses stem from the wrongful dismissal of an atrocious assault and battery complaint which resulted from a fight in a tavern in Egg Harbor City on March 17, 1968. The false swearing counts in the indictment stem from the appearance of the defendant before the grand jury on November 8, 1972.

II.

Plaintiff-appellant, Helfant, a member of the New Jersey bar and a former municipal court judge of that state, alleged in a verified complaint that he had been advised that he was the target of a state grand jury investigation into an alleged withdrawal of a criminal charge of atrocious assault and battery. Armed with this information, and asserting a Fifth Amendment privilege, Helfant refused to testify when he first appeared before the state grand jury on October 18, 1972. He was subsequently subpoenaed to appear again before the grand jury on November 8, 1972, which was then sitting at the Trenton State House Annex on the same floor as the chambers of New Jersey State Supreme Court justices. Helfant was also directed to appear before the justices of the Supreme Court in their private chambers 10 minutes before his scheduled re-appearance before the grand jury.

The complaint averred that upon his appearance in the Supreme Court chambers, several justices asked questions about the subject matter of the grand jury investigation, including matters not then made public and also including inquiries concerning certain witnesses who had testified against Helfant before the grand jury.[2]

2. Helfant's complaint avers:

He was questioned by the Chief Justice [Weintraub] and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State

His complaint averred that "[a]fter . . . [he] left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. * * * As a result of these questions, [by justices of the Supreme Court,] the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well."

Helfant also averred that Deputy Attorney General Hayden, conducting the grand jury investigation, entered the Supreme Court chambers after plaintiff left and that Hayden had also preceded the plaintiff into the chambers.

Finally, his complaint alleges:

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Ex-

2. (Cont'd.)

Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

ecutive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him.

At the injunction hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. Relevant testimony by Helfant is set forth in the margin.[3]

3. Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

* * *

Q. Were they sitting in their robes?

A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in?

A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

* * *

Q. And what was your state of mind and your feelings as you entered those Chambers?

A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation?

A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right

By oral opinion the district court denied preliminary injunctive relief on the ground that *Younger v. Harris, supra,* precluded federal intervention. It also dismissed the complaint for failure to state a claim for which relief can be granted. In the posture in which this case is before us, the district court has ruled only on the legal sufficiency of the complaint, pursuant to the Rule 12(b)(6) motion. "Findings of fact . . . are unnecessary on decisions of motions under . . . [Rule] 12. . . ." Rule 52(a), F.R. Civ. P. Although an evidentiary hearing on the injunction request was conducted, and the court made limited findings thereon, it did not find facts with respect to the merits of Helfant's § 1983 claim. Thus, there have been no fact-findings on the crucial issue of whether Helfant's

3. (Cont'd.)

to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond?

A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was suppose to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice?

A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court?

A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out——

A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him?

A. I said, Mr. Chief Justice, I am going to testify.

N.T. 22-26.

testimony before the grand jury was the product of his free and unconstrained will. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

"Since *Chambers v. Florida*, 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical. . . ." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts v. Indiana*, 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn v. Alabama, supra*, 361 U.S. at 208.

III.

Because we are reviewing a Rule 12(b)(6) dismissal order, we must take as true Helfant's allegations that his testimony before the grand jury was not the product of a free and unconstrained will and that he is about to be tried on an indictment containing charges emanating from that coerced testimony.

Younger v. Harris, supra, 401 U.S. at 53, holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *See, Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971); *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the predicate of *Younger v. Harris* is an assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Thus, invocation of the "extraordinary circumstances" exception must bring into play the suggestion of an inability of the state forum to afford an adequate remedy at law.

By his complaint, plaintiff alleges that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that, as a result, he was indicted because of his allegedly coerced testimony. Helfant also avers that a New Jersey trial court has declined his motions to dismiss indictments emanating therefrom, on the grounds that they were based on his coerced testimony. *See, e.g., United States v. Calandra*, — U.S. — (42 U.S.L.W. 4104, January 8, 1974).

Under the unusual circumstances of this case, can it be said that the appellant may not vindicate his constitutional rights by a defense in "a single criminal prosecution"? Otherwise stated, do the administrative powers of the New Jersey Supreme Court, in the factual complex giving rise to appellant's constitutional claims, threaten his opportunity for the vindication of his federal rights in the New Jersey state court system? Thus our analysis requires an examination of the "power parameters" of the New Jersey Supreme Court.

IV.

The New Jersey Constitution provides: "The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State." Article VI, § 7, Par. 1. "The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by Rules of the Supreme Court." Article VI, § 7, Par. 2.

"Thus this court is charged with responsibility for the overall performance of the judicial branch. Respon-

sibility for a result implies power reasonably necessary to achieve it. More specifically, the power to make rules imports the power to enforce them." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961).

"The constitutional administrative power is absolute and unqualified, and our Supreme Court has characterized it as the 'plenary responsibility for the administration of all courts in the State.' State v. De Stasio, 49 N.J. 247, 253, 229 A.2d 636, 639, cert. den. 389 U.S. 830, 88 S.Ct. 96, 19 L.Ed.2d 89 (1967). See in re Mattera, 34 N.J. 259, 271-272, 168 A.2d 38 (1961). See also N.J. Const., Art. XI, § IV, par. 5; *cf.* N.J. Const., Art. VI, § VII, par. 1. Additionally, compare Kagan v. Caroselli, 30 N.J. 371, 379, 153 A.2d 17, 21 (1959), wherein the court observed that '[t]he Constitution places the administrative control of the municipal court in the Supreme Court and the Chief Justice. Art. VI, § 2, par. 3; Art. VI, § 7, par. 1. There is no room for divided authority.'

"The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. Conceptually, such authority encompasses all facets of the internal management of our courts. *Cf. Mattera, supra,* 34 N.J. at 272, 168 A.2d 38. This was made clear by the Committee on the Judiciary which considered it a fundamental requirement that the courts be vested with 'exclusive authority over administration.' 2 Proceedings of the Constitutional Convention of 1947, at 1180, 1183." *Lichter v. County of Monmouth,* 114 N.J. Super., 276 A.2d 382, 385-386 (1971).

Thus, it becomes readily apparent that the Supreme Court of New Jersey is more than an appellate court. Its "constitutional administrative power is absolute and unqualified." The Chief Justice "may from time to time transfer Judges from one assignment to another." The Supreme Court may assign judges to the Appellate Division for terms fixed by its own rules. The Supreme Court is vested with formidable supervisory and administrative

power extending not only to the trial court level but to the Appellate Division as well.

The posture of this case, requiring that we assume that the allegations charging coercion by the Supreme Court are true, the next question appears to be whether the appellant may vindicate his constitutional rights in this case in a state court system which functions under the "absolute and unqualified" administrative power of its highest court.

V.

Distilled to its essence, appellant's argument is that the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire state court system in processing his constitutional claim. But the schema of judicial review of federal constitutional questions presented in the state cases is not confined to the state court system. If convicted, and if persuaded that principles of federal constitutional law were not properly applied in the state system, Helfant will have the opportunity of applying for certiorari to the United States Supreme Court, 28 U.S.C. § 1257(3), and if given a custodial sentence, will have the additional right to apply to a federal forum for federal habeas corpus relief, 28 U.S.C. § 2254.

What complicates this particular case, however, is that the resolution of Helfant's specific contention will not be confined to interpreting, refining, or defining principles of constitutional law. Critical to the eventual constitutional interpretations is the threshold determination of whether Helfant's testimony before the grand jury was the product of a free and unconstrained will. This is not a question of law. It is a question of fact—narrative or historical facts as to what occurred and operative or constitutional facts as to the voluntariness of his actions. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. And some fact-finder must decide these.

We have not been directed to, nor has our research disclosed, any procedure by which this factual determination may be made by a jury. In New Jersey criminal law procedures, as is the case in federal practice, ultimate facts found by criminal court juries are merely verdicts of guilty or not guilty. The factual determination of the "free and unconstrained will" question within the state system will be made by a New Jersey state judge, a state judge subject to the "absolute and unqualified" administrative power of the Supreme Court, whose findings are presumably reviewable by an Appellate Division, assignment to which shall be by terms fixed by the rules of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself.[4] Thus, the New Jersey state court system would play an important role in both the fact-finding process and the review thereof, although upon acceptance of certiorari, "it is . . . [the U.S. Supreme Court's] duty . . . to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis v. North Carolina*, 384 U.S. 737, 741-742 (1966).

A litigant has come into a federal court asking for vindication of a federal constitutional right which is critically dependent upon a finding arising out of circumstances in which six of seven members of the New Jersey Supreme Court as then constituted are alleged to be directly

4. The New Jersey Supreme Court has set forth in detail the scope of appellate review of facts found by a trial judge: "There can be no doubt of the *power* of the appellate tribunals of this State . . . to review the fact determinations of a trial court in all cases heard without a jury and to make new or amended findings. * * * The aim of . . . review . . . is . . . to determine whether the findings could reasonably have been reached on sufficient credible evidence present in the record. * * * But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *State v. Johnson*, 42 N.J. 146, 199 A.2d 809, 816-818 (1964). *See also, State v. Yough*, 49 N.J. 587, 231 A.2d 598, 602 (1967); *State v. Daly*, 126 N.J. Super. 313, 314 A.2d 371, 373 (1973). The Supreme Court, in reviewing the decision of the Appellate Division, may itself deem it appropriate to conduct a *de novo* review. *State v. Johnson, supra*, 199 A.2d at 818.

involved. If denied federal relief, appellant will be restricted to a judicial procedure in which the resolution or modification of factual determinations would be committed to a court system under the administrative supervision of the participants in the factual complex. This presents an extremely awkward position.

VI.

To determine whether there should be an exercise of even limited federal judicial power under these circumstances requires a brief review of those fundamental principles which govern federal-state relations. Initially, the federal courts have subject matter jurisdiction of an action commenced by a person "[t]o redress the deprivation, under color of any State law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ." 28 U.S.C. § 1343(3). Congress has afforded Helfant a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. And the Supreme Court has held that this may be by means of injunction, *Mitchum v. Foster*, 407 U.S. 225 (1972), or by declaratory judgment, *Steffel v. Thompson*, — U.S. — (42 U.S.L.W. 4357, March 19, 1974).

In the sensitive and delicate area of federal-state relations, where the power of government is divided between a federation and its member states, there is no constitutional barrier, and since *Mitchum v. Foster, supra*, no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judicial Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined

statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved." *Douglas v. City of Jeannette,* 319 U.S. 157, 162-163 (1943).

In *Stefanelli v. Minard,* 342 U.S. 117, 120 (1951), Mr. Justice Frankfurter emphasized that this policy of federal court restraint is based on "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." "Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute [Civil Rights Act] 'should be construed so as to preserve the proper balance between the States and the federal government in law enforcement.' *Screws v. United States,* 325 U.S. 91, 108." *Ibid.,* at 121.[5]

Mr. Justice Black would emphasize in *Younger v. Harris, supra,* 401 U.S. at 44: "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means

5. "Mr. Justice Holmes dealt with this problem in a situation especially appealing: 'The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and intervene.' Memorandum of Mr. Justice Holmes in V. Sacco/Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516." *Ibid.,* 342 U.S. at 124-125.

centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Thus, federal judicial policy against intervention in state criminal proceedings is bottomed on an unwillingness for federal *disturbance* of "the notion of 'comity,' that is, a proper respect for state functions," state institutions, and especially, state court systems. We now proceed to determine whether some minimum exercise of federal authority in these proceedings will *disturb* or whether it will *implement* this proper respect for state functions.

VII.

So posited, we reject appellant's basic contention that he is entitled to a federal order permanently enjoining the prosecution of the indictments. "[C]ourts of equity in the exercise of their discretionary powers should . . . [refuse] . . . to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds." *Douglas v. City of Jeannette, supra,* 319 U.S. at 163. In the context of permanently enjoining the state prosecution, we do not find bad faith or harassment, *Dombrowski v. Pfister,* 380 U.S. 479 (1965), nor do we find this to be one of those "exceptional cases," *Douglas v. City of Jeannette, supra,* or "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of

the usual prerequisites of bad faith and harassment." *Younger v. Harris, supra,* 401 U.S. at 53. We have not been persuaded that Helfant will be precluded from asserting constitutional rights in his defense of a single criminal proceeding. *Younger v. Harris, supra.*

We find no reason to depart from the formidable general policy of "leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this [Supreme] Court of any federal questions involved." *Douglas v. City of Jeannette, supra,* 319 U.S. at 163.

The considerations which militate against granting a permanent injunction against the conduct of the state trials do not surface, however, when considering the limited relief of a federal declaratory judgment as to whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. If limited federal intervention is permitted, the state court system will ultimately be free to conduct the trials and appeals, if any, as an independent judiciary, free from any interference.

Since Helfant has a statutory right to have a claim for declaratory relief adjudicated in the federal courts, and will be denied the opportunity to be heard only if there is a threat to the delicate structure of comity between the federal and state systems, our next task is to examine the effect of limited federal fact-finding under these highly sensitive circumstances.

Judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove. Lord Herschell's remark to Sir George Jessel comes to mind: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."[6]

In the context of this highly unusual factual complex, it is critical that traditional respect for an outstanding

6. R. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605, 606 (1908).

state court system be nurtured, preserved, and supported; that the state court process this indictment without the slightest suggestion that it is unable to perform its function without total objectivity, or that there be even the appearance of any infirmities. Federal court action which seeks to guarantee such an appearance and which bolsters and enhances the reputation of a state court system does not denigrate comity. Indeed, it supplies a positive affirmation of the high respect the court system of one sovereign extends to that of another. To order federal fact-finding within an extremely narrow compass, under these circumstances, comports with, rather than offends, the mutual relationship poignantly described by Justice Black as "Our Federalism."

Such limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the "brooding omnipresence" of the New Jersey Supreme Court. At the same time if the case proceeds to a state appellate level, judges of the reviewing courts will be able to adjudicate any federal constitutional questions with maximum freedom. Moreover, if the case should proceed to the New Jersey Supreme Court, that court will not be placed in an untenable situation of being a court of review as to findings of facts in which they are allegedly participants.

We are persuaded that there will be total "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris, supra,* 401 U.S. at 44. Thus, by a federal resolution of this limited issue, the factual predicate of the appellant's federal claim will be resolved in the federal forum and, at the same time, the

state will be completely free to proceed with the state prosecution and therein to vindicate appellant's constitutional rights.

Such limited declaratory relief does not have the force of an injunction, *Younger v. Harris,* or a declaratory judgment couched in such terms as would have "virtually the same practical impact as a formal injunction would." *Samuels v. Mackell,* 401 U.S. 66, 72 (1971). The use of the declaratory judgment here fits in precisely with the exception articulated by Mr. Justice Black in *Samuels v. Mackell,* 401 U.S. at 73: "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief."

We are quick to recognize that it may be contended that even such limited federal intervention in a state criminal proceeding would set an unwholesome precedent. Because of the high incidence of judicial fact-finding in pretrial hearings ancillary to state prosecutions, it can be envisioned that wholesale resort to this technique would be attempted. We are persuaded that any precedential value to our holding is miniscule. The factors which prompt our decision also limit its precedential value. First, perforce, the operative facts are limited to the State of New Jersey, where its constitution vests in the Chief Justice and the state's highest court the total and complete administrative control over judges of the trial level and appellate division. Second, this case alleged involvement by the Supreme Court with a municipal court judge, who allegedly was the target of state grand jury proceedings and who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Third, it is alleged that prior to such appearance before

the state's highest court, Helfant had resolved to invoke the Fifth Amendment before the grand jury and that questioning by the Supreme Court appearance so unnerved him that he was unable to exercise a totally free will. Absent presence of these factors we see no future case receiving much precedential nourishment from the decision we reach today.[7]

Accordingly, the order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court,[8] unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court. The mandate of this court shall issue forthwith.

ADAMS, *Circuit Judge,* dissenting

The majority, while conceding that this case presents "a delicate question of federal-state comity," resolves that

7. There was some suggestion that this court should construe the New Jersey public employee immunity statute, N.J.S.A. 2A: 81-17.2a2 in the context of Helfant's grand jury appearance. The litigants agree that this statute is not applicable since Helfant's presence before the grand jury was not associated with his role as a municipal court judge, but as a private attorney.

8. "A court of the United States may . . . grant an injunction to stay proceedings in a State court . . . where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283.

question by sanctioning federal interference in an ongoing state criminal proceeding. Warrant for this interference is purportedly found in the "extraordinary circumstances" exception to the anti-injunctive strictures of Younger v. Harris.[1] I conclude that this case, unusual as its facts may be, provides no occasion for casting aside the interwoven precepts of federalism and equitable jurisdiction that combine to make up the *Younger* doctrine of non-intrusion. Accordingly, I dissent.

The majority's exposition of the rule of *Younger* is fair: a federal court may not interfere in an ongoing state criminal proceeding [2] absent a showing of prosecutorial bad faith or harassment, or other "extraordinary circumstances." It is conceded that neither bad faith nor harassment are present in Helfant's prosecution.[3] Rather, the majority holds that the alleged involvement of the New Jersey Supreme Court in Helfant's prosecution embodies an "extraordinary" situation.

What the majority appears to overlook is that *Younger*, while setting out a nucleus of rules, did more. It expressed a spirit. Though some of the historical antecedents of the *Younger* decision undoubtedly extend further,[4] the first formal expression of the *Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued "to stay proceedings in any court of a

1. The term "anti-injunctive" is, of course, shorthand for the notion that *any* federal interference in ongoing state criminal proceedings, be it by injunction, declaratory judgment, or otherwise, is to be disfavored. *See* Samuels v. Mackell, 402 U.S. 66 (1971).

2. *Compare* Steffel v. Thompson, 14 Cr. L. Rep. 3123 (U.S., Mar. 19, 1974).

3. "Bad faith" and "harassment" signify, generally, that a prosecution is being brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

4. For example, the conflict between law and equity, particularly as embodied in the practice of equity of enjoining proceedings at law, extends back at least into the seventeenth century. *See* O. Fiss, Injunctions 12 (1972). Justice Frankfurter, speaking more particularly, stated "[t]he maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

state."[5] Two apparent motives behind the statutory inhibition of the 1793 Act were to prevent encroachments by federal courts upon the then well-established state-court domain, and to codify the prevailing prejudices against extensions of equity jurisdiction and power.[6] One hundred and fifty years later the theme was repeated in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.[7] There the anti-injunction statute was viewed as necessary, in part, to "prevent needless friction between state and federal courts."[8] And only this term the Supreme Court reiterated its sensitivity "to principles of equity, comity, and federalism."[9]

Of course, the Supreme Court has recently acknowledged that section 1983, under which Helfant's suit has been brought, is a specific exception to the absolute interdiction of the anti-injunction statute.[10] Nonetheless, section 2283 expresses a "long standing public policy"[11] against federal interference in state proceedings. The emanations from that policy must thus be heeded even in a 1983 suit.[11a] Accordingly, the same considerations that underlay the 1793 Act and its successors—a respect for state sovereignty and "basic doctrine[s] of equity" which "restrain . . . equity jurisdiction within narrow limits"[12]—have been imported into our civil rights jurisprudence.

5. 1 Stat. 335, the forebear of 28 U.S.C. § 2283. *See* Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. Chi. L. Rev. 471, 480 (1965). The statutory ban is today subject to several clearly delineated exceptions. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

6. *See* C. Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 131 (1941).

7. 309 U.S. 4 (1940).

8. *Id.* at 19.

9. Steffel v. Thompson, *supra*.

10. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

11. Younger v. Harris, 401 U.S. 37, 43, 46 (1971); Mitchum v. Foster, *supra*, 407 U.S. at 230.

11a. *See* O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Mitchum v. Foster, *supra*, 407 U.S. at 243.

12. Younger v. Harris, *supra*, 401 U.S. at 43, 44.

The prime vehicle of this importation is Younger v. Harris.[13] Supplemented by Samuels v. Mackell, *supra*, the *Younger* doctrine makes it clear that *only* prosecutorial bad faith or harassment, or "perhaps other extraordinary circumstances"[14] will justify federal intrusion, by way of injunction, declaratory relief or, as here, "federal fact-finding," into a state criminal proceeding. The doctrine is not hortatory. Given the policies incarnate in the *Younger* rule, it would appear that we should sanction interference under the "extraordinary circumstances" exception only when absolutely satisfied that neither "comity" nor equitable principles of restraint will suffer. Analysis of Helfant's situation leaves me far from satisfied that such is the case here.

A. "Comity"

The concept of comity, though often invoked, tends to elude precise definition. Webster's dictionary offers a generic meaning—"mutual consideration between . . . equals." In the context of federal-state judicial relations, the meaning is more sharply etched. "Comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."[15]

Among the "state functions" of which a federal court should be particularly respectful is the administration of

13. It must be noted that the Supreme Court, in *Younger*, emphasized that the anti-intrusive spirit adumbrated there was not a departure from the Court's prior decisions. *See, e.g.*, Fenner v. Boykin, 271 U.S. 240 (1926); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Dombrowski v. Pfister, 380 U.S. 479 (1965).

14. Perez v. Ledesma, 401 U.S. 82, 85 (1971).

15. Younger v. Harris, *supra*, 401 U.S. at 44.

state criminal justice.[16] The recognition that administration of the criminal law is "intimately involved with sovereign prerogative"[17] should result in an extreme diffidence on the part of a federal court asked to intrude into the state criminal process. Diffidence may be dispelled where, as in cases of "bad faith" or "harassment," the criminal law is being utilized for other than its ordinary, legitimate purpose, or where the state is acting in flagrant disregard of the orderly processes of criminal justice. But when, as here, a criminal prosecution has been brought with the hope of obtaining a valid conviction, "comity" dictates that the federal courts indulge every presumption in favor of the state court's impartiality, orderliness and competence to decide federal questions.

While avowing its recognition of this notion of respect for state functions, the majority concludes that the presumption in favor of the state criminal justice system is punctured and deflated by the circumstances of this case. The majority's view distills to this: because the New Jersey Supreme Court exercises rather plenary "administrative power" over the lower state courts, and because certain of the Justices of the New Jersey Supreme Court itself were the alleged instrument of Helfant's "coercion," there is likelihood of partiality on the part of the state trial court that would, ordinarily, resolve the factual questions embodied in Helfant's Fifth Amendment claim.[18]

The erection and entertainment by this Court of the foregoing scenario, and its use as a justification for interfering in a state criminal proceeding, appears to me to be squarely in the teeth of the spirit of comity expressed in

16. *See* Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction*, 1973 Ariz. St. U.L.J. 557, 572 (1973).

17. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

18. Of the Justices that were on the New Jersey State Supreme Court at the time of the incident referred to in Helfant's complaint, only four remain as members of the Court, and more specifically the Chief Justice, who exercises the administrative supervision referred to in the majority opinion, has since retired.

Younger. The scenario presumes, for example, that the state trial judges act with a constant eye on the New Jersey Supreme Court, seeking not to apply the law fairly but to preserve or advance their own interests by a devious, obsequious sycophancy. It seems to postulate, further, that the New Jersey Supreme Court itself might be so venal and vindictive as to mete out some administrative "punishment" in the event that a trial court determined that Helfant had been "coerced." Finally, the majority's view overlooks what is the case in the federal system as well as in the states—that courts are sometimes asked to resolve controversies in which a party holds some power to affect adversely the very judges who are deciding the dispute.[19] In such instances, there is not imputed to the federal courts a hint of partiality. "Mutual respect among equals"—the generic definition of "comity"—would seem to demand, then, that no such imputation be made concerning the state courts either.

The majority, perhaps in recognition of the harsh light in which their decision might seem to cast the New Jersey courts, try to meliorate the implications of their opinion by speaking in terms of the mere "appearance" of a less than impartial state court process.

In sum, the majority's assertion that the possible "appearance of a biased [state] decision" warrants federal intrusion smacks of the federal high-handedness that section 2283 and *Younger* were fashioned to prevent. In my view, the spirit of comity, properly conceived and applied, would be reason enough to reject Helfant's plea for federal relief at this stage of the controversy.[20]

19. To cite an obvious example, federal courts quite often assess the constitutional validity of Congressional legislation. Congressmen, of course, may grant or withhold a salary increase to federal judges at any time. There thus exists something of an economic motivation for a federal judge to be less than impartial in reviewing federal legislation. Yet I do not think the probity of a federal court decision may be properly questioned on such basis.

20. Only recently, a three-judge federal district court sitting in New Jersey rejected the notion that the New Jersey state courts are incapable of fairly adjudicating issues implicating their own state Supreme Court. In American Trial Lawyers Ass'n. v. New Jersey Supreme Court, No. 64-72

B. "Great and Immediate" Harm

A crucial aspect of *Younger's* limitation upon incursions into state proceedings is the concept that federal interference may be sanctioned, if at all, only when the alleged unconstitutional harm will be "both great and immediate."[21] This teaching has its genealogy in traditional precepts of equitable restraint.[22] A consideration of the facts of the present dispute shows that, even were it the case that Helfant had been "coerced" into testifying, any harm resulting from that coercion would not be "immediate"—a *sine qua non* of federal relief.

The majority, having correctly determined that there is no basis in law for an outright injunction against Helfant's prosecution, concludes that if the facts are as Helfant alleges, declaratory relief should issue to the effect that the "coerced" testimony may not be introduced at Helfant's trial. The edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the state will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing. At oral argument, counsel for the state represented to this Court that Helfant's grand jury testimony will be used, if ever, *only* to impeach any inconsistent statements Helfant might utter should he take the witness stand.[23] The

20. (Cont'd.)
(D. N.J., June 20, 1972), where there was attacked by a bar association a rule promulgated by the Supreme Court setting forth the ground rules for contingent fees, the district court in rejecting the complaint stated:

> "Rather [plaintiffs] emphasize that by leaving [their claims] to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the State Supreme Court."

21. Younger v. Harris, *supra*, 401 U.S. at 46; Fenner v. Boykin, *supra*, 271 U.S. at 243.

22. Fletcher v. Bealey, 28 Ch. 688 (1885). *See* Story, Equity Jurisprudence 377 (1919).

23. The colloquy at oral argument between the Court and counsel for New Jersey was as follows:

> Judge Aldisert: Is the state representing to this federal court that it does not intend to and will not use the testimony elicited from the plaintiff at the grand jury proceeding?

"harm" that the majority's decision seeks to avert is thus conjectural, depending for its very existence upon events that may never occur. Consequently, the majority's result tends to ignore or flout the "great and immediate" requirement.

Another point should be mentioned briefly here. Helfant was indicted for three "substantive" offenses,[24] as well as for false swearing before the grand jury. Insofar as the false swearing counts are concerned, it would appear that Helfant's grand jury testimony will be admissible in evidence in any event, even if it should be determined that that testimony was "coerced." The Supreme Court, and this Court as well, have held that the Fifth Amendment does not confer upon a witness the privilege to lie while under oath.[25] Thus, though "coerced" testimony may not be used to establish Helfant's commission of "substantive" offenses, it would appear that the state may use it to prove that he swore falsely.

The majority's disregard of the "great and immediate" limitation thus emerges in sharp focus. There is no reasonable assurance that Helfant's grand jury utterances will *ever* be introduced at trial of the substantive counts, and there is a positive indication that Helfant can

23. (Cont'd.)

A. At this time there is no present intention of using that testimony. But were the appellant to take the stand, were his testimony to deviate in strong terms, that testimony then, of course, under Harris v. New York, might well be . . . .

JUDGE ALDISERT: . . . [N]ow we do not have as strong a position that I thought we had a minute ago.

* * * * *

JUDGE ALDISERT: The question now comes if the plaintiff is not entitled to federal court protection of an asserted constitutional right at this time, at what time could he possibly have federal protection if an issue at stake is the possible bias of a state court system?

A. Were the state to seek to introduce the grand jury testimony as a declaration against penal interests, for the purpose of argument, perhaps the appellant might have standing to come into this Court.

24. The three "substantive" state offenses with which Helfant is charged are conspiracy, obstructing justice, and aiding in the compounding of a crime.

25. *See* United States v. Knox, 396 U.S. 77 (1969); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). *See also* United States ex rel. Annuziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

suffer no unconstitutional harm at all by introduction of his testimony at trial of the false swearing counts. The equitable doctrine that harm must be imminent before an injunction will issue against a state criminal proceeding—a precept whose substance is an integral part of the doctrine of federal non-intrusion—is, therefore, disregarded by the result the majority reaches.[25a]

C. "IRREPARABLE INJURY" AND "ADEQUATE REMEDY AT LAW"

Among the central limiting principles of equity jurisprudence is the maxim that equity will act only when there is no adequate remedy at law.[26] This notion, too, has its roots in the historical bifurcation—and the resultant conflict—between courts of law and of equity.[27] The requirement that a plaintiff show "irreparable injury" before an injunction will issue is but an alternative statement of the "adequate remedy" rule.

Younger emphasizes that the "adequate remedy" rule is to be given rigorous application when a federal court is asked to interfere in an ongoing state criminal proceeding. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial:

> "Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves, be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." [28]

Even prior to *Younger* the Supreme Court had explained, in forceful language, why challenges to certain

25a. *See* O'Shea v. Littleton, *supra*, 414 U.S. at 498.

26. O. Fiss, Injunctions 9 (1973).

27. *Id.* at 12. *Cf.* Story, Equity Jurisprudence 375-80 (1919).

28. Younger v. Harris, *supra*, 401 U.S. at 46; *see also* Watson v. Buck, 313 U.S. 387, 400 (1941).

types of unconstitutionality would not ordinarily support federal interruption of a state criminal trial. First, the state criminal process is presumed to be an "adequate" channel for vindicating federal rights. Second, if federal relief were granted in the midst of a state criminal proceeding,

> "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum . . . to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities . . . to subvert the orderly, effective prosecution of local crime in local courts."[29]

This exposition by the Supreme Court of the underpinnings of the adequate remedy doctrine makes plain that, besides honoring tenets of equitable restraint, the adequate remedy rule advances and protects the concept of federal-state comity. The requirement that there be no adequate remedy at law is thus strengthened by *Younger's* explicit and implicit re-invigoration of "a proper respect for state functions."[30]

The sanctioning of federal relief at this stage of Helfant's prosecution practically undermines the "adequate remedy" precept. What Helfant seeks, and what the majority would permit, is a federal declaration in the middle of a state criminal trial to the effect that certain evidence

29. Stefanelli v. Minard, 342 U.S. 117, 123-24 (1951) (footnotes omitted); *see also* Cleary v. Bolger, 371 U.S. 392, 397 (1963).

30. 401 U.S. at 44. It is significant to note that Justice Brennan, writing for the majority in Dombrowski v. Pfister, *supra*, 385 U.S. at 485 n.3, adverted to a situation closely analogous to that presented in this case. He said:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

was unconstitutionally obtained, and so is inadmissible in the state court. To my mind, this situation so closely resembles that adverted to in *Stefanelli, supra,* that there is little justification for denominating this an "extraordinary situation" and shelving the restraints on our remedial powers. A criminal prosecution, followed by appeal and petition for certiorari, is presumed to be an adequate remedy for the constitutional deficiencies Helfant alleges. The "inadequacy" the majority perceives is, of course, the asserted involvement of the New Jersey Supreme Court. However, as we have seen, that very claim of "inadequacy" is itself in derogation of the program of comity.

Moreover, there is an alternative federal remedy available to Helfant if the need for it should ever arise, a remedy which would provide an opportunity for the sort of "federal fact finding" adverted to by the majority. Yet, this alternative remedy—habeas corpus—would not cause so severe a wrench to federal-state relations as the one advanced by the majority. Should Helfant lose his Fifth Amendment claims in the state courts and receive a custodial sentence,[31] he may seek a writ of habeas corpus. The habeas statute would appear to require full federal fact finding on Helfant's "coercion" claim,[32] given the circumstances Helfant alleges.

Again, the dominant chord of *Younger,* requiring as it does that we pay scrupulous heed to the adequacy of state remedies and alternative federal remedies, appears to have been abridged by the majority's decision. And

31. *See* 28 U.S.C. § 2254; United States ex rel. Dessus v. Pennsylvania, 452 F.2d 557 (3d Cir. 1971), *cert. denied,* 409 U.S. 854 (1972).

32. 28 U.S.C. § 2254(d) provides in part that in federal district courts, upon an application for *habeas,* prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

certainly, when the "adequate remedy" rule, the requirement of "great and immediate" harm, and the cardinal principle of comity are considered together, the sanctioning of federal interference in this case cannot be justified.

D. "Extraordinary Circumstances"

The assumption that there exists an "extraordinary circumstance" exception to *Younger's* interdiction is grounded in the language of the *Younger* opinion itself. There, the Supreme Court said:

> "There *may*, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." [33]

But the Court immediately proceeded to point to an illustration of what such circumstances might be, quoting from Watson v. Buck: [34]

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." [35]

No other delineation of the contours of the "extraordinary circumstances" exception has yet been undertaken by the Supreme Court. Indeed, scattered statements by the Court seem to indicate doubt on the part of some of the Justices that any such exception exists at all. Thus in Perez v. Ledesma,[36] for example, decided on the same day as *Younger*, Justice Black was willing to say only that "*perhaps* in . . . extraordinary circumstances where irreparable injury can be shown is federal . . . relief against

33. 401 U.S. at 53 (emphasis added).
34. 313 U.S. 387 (1941).
35. *Id.* at 402.
36. 401 U.S. 82 (1971).

pending state prosecutions appropriate." [37] And only recently, in Allee v. Medrano,[38] Chief Justice Burger, joined by two other members of the Court, offered a reading of *Younger* that seems to leave no room for any extraordinary circumstances exception:

> "To meet the Younger test the federal plaintiff *must* show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts." [39]

While it cannot be said that these statements affirmatively establish that there is no "extraordinary circumstances" exception, they do indicate that uncertainty exists concerning what circumstances, if any, will warrant federal intrusion under that circumscribed exception. Absent a clear benchmark to guide us in identifying "extraordinary circumstances," we should hew closely to the concepts of equitable restraint and comity, concepts which, after all, *Younger* was designed to preserve, protect and perpetuate.

E. Practical Considerations

Thus far, I have sought to point out how historical and doctrinal considerations weigh against a federal incursion into the midst of Helfant's state prosecution. But more is called for in this case than "a merely doctrinaire alertness to protect the proper sphere of the states in enforcing their criminal law." [40] A glance at pragmatics and at the realities of time and cost emphasize how damaging to federal-state relations the majority's decision may prove.

37. *Id.* at 85.
38. — U.S. — (May 20, 1974).
39. Slip opinion at 16 (Burger, C.J., concurring and dissenting).
40. Stefanelli v. Minard, *supra*, 342 U.S. at 123.

Helfant was first subpoenaed to appear before the state grand jury in October of 1972. On January 17, 1973, an indictment was returned, charging Helfant with the commission of crimes that occurred as early as 1968. It has now been more than a year-and-a-half since New Jersey has been thwarted from proceeding with the prosecution because of the federal intervention sought by Helfant. During that time, a critical witness has died and the administration of the prosecutor's office has changed. The prospect now is for further delay, since "fact finding" has been ordered in the district court, and because there is the possibility of another appeal to this Court from the fact finding proceeding. It is, therefore, not unlikely that a two-year suspension in the state prosecution will result. A delay of such duration in a state criminal proceeding, sanctioned by a federal court, and predicated solely on a challenge to the admissibility of evidence—evidence that may never be offered—would certainly seem to be an "insupportable disruption."[41] This is particularly true in these times when special efforts are being made to expedite criminal proceedings.[42]

Looming large among the doctrinal premises of Younger, of section 2283, and of the recent proliferation of commentary justifiably decrying the "denigration of state courts,"[43] is the idea that, for our federal system to function as it ought, the states must be accorded a full measure of dignity, respect and confidence. When a federal court, on the occasion of a criminal defendant's objection to evidence, imposes a substantial impediment upon a state criminal trial, little is done to enhance the prestige of either court, state or federal.

What is at stake in this case is the need to strike a balance between the regimen of non-intrusion on the one

41. *Id.*

42. *See, e.g.*, Rule 50(b), Federal Rules of Criminal Procedure; ABA Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968).

43. Aldisert, *supra*, at 573.

hand, and a citizen's right to federal disposition of his federal claims on the other. The two are not irreconcilable. Helfant, under the view expressed in this dissent, could have his day in federal court by certiorari or by habeas. And, of course, by declining to permit federal interference now we would save to the state its sovereign prerogative to try an accused without delay. The majority's solution of the problem, however, disrupts and disdains the state process for no other reason than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy. Comity thus suffers, not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated ***instanter***.

For all of the reasons set forth, I dissent, and would affirm the judgment of the district court.

Judges Van Dusen and Weis join in this dissenting opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order Granting Rehearing *En Banc*, dated January 11, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

Present:

SEITZ, *Chief Judge*, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

A majority of the active Judges having voted for rehearing en banc in the above-entitled case,

It is ORDERED that the Clerk of this Court list the above case for rehearing before the Court en banc at the convenience of the Court.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: January 11, 1974

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing *En Banc*, dated October 31, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

Present:

SEITZ, *Chief Judge*, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

ORDER

The Petition for Rehearing filed by the defendants-appellees having been submitted to the judges who par-

Order Vacating Judgment Granting Petition for Rehearing and Denying Petition for Rehearing En Banc dated October 31, 1973

ticipated in the decision of this court and to all other available circuit judges of the Circuit in regular active service, and the judges who concurred in the decision of the panel which heard the appeal having voted for panel rehearing,

It is Ordered that the Petition for Rehearing en banc is denied, and it is further

Ordered that the judgment of this court dated September 10, 1973 be and is hereby vacated, and the Clerk of this Court shall list this appeal for submission to a panel consisting of Judges Staley, Adams, and Gibbons pursuant to Rule 12(6) on November 19, 1973, and it is further

Ordered that the parties shall, simultaneously, on or about November 10, 1973 file with the court supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on that ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof. *See Gelbard* v. *United States,* 408 U. S. 41, 60 (1972); *United States* v. *Blue,* 384 U. S. 251 (1966); *Lawn* v. *United States,* 355 U. S. 339 (1958); *compare Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

By the Court,

John J. Gibbons
Circuit Judge

Dated: October 31, 1973

Certified Judgment in Lieu of Mandate, dated September 10, 1973

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-1386

Edwin H. Helfant,

Appellant,

vs.

George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., and Mark A. Sullivan, of the Supreme Court of New Jersey, and The State of New Jersey,

Appellees.

(D. C. Civil Action No. 607-73)

On Appeal From the United States District Court
For the District of New Jersey

Present:

Staley, Adams and Gibbons, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Certified Judgment in Lieu of Mandate, dated September 10, 1973

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted, be and hereby is reversed. The order of May 9, 1973, of the said District Court which order denied plaintiff's motion for a preliminary injunction be and hereby is vacated and the cause remanded to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits, and it is directed that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this Court, all in accordance with the opinion of this Court.

ATTEST:

THOMAS P. QUINN
Clerk

September 10, 1973

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 7, 1973

Before:

STALEY, ADAMS and GIBBONS, Circuit Judges

PERSKIE & CALLAHAN, ESQS.
By: MARVIN D. PERSKIE, ESQ.
PATRICK T. MCGAHN, JR.
3311 New Jersey Avenue
Wildwood, New Jersey 08260
Attorneys for Appellant

GEORGE F. KUGLER, JR., ESQ.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for Appellees

OPINION OF THE COURT

(Filed—September 10, 1973.)

PER CURIAM

This is an appeal from an order of the district court which (1) denied plaintiff's motion for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state, and (2) granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, but in view of its ruling on the defendants' motion made no findings of fact.

The plaintiff-appellant Helfant is a member of the New Jersey bar and a former municipal court judge of that state. His verified complaint alleges:

"4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury Investi-

gation, inter alia, into an alleged illegal withdrawal on an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the plaintiff was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the United States Constitution and refused to testify.

6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the

Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff

about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy At-

torney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation."

The complaint also alleges:

"14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitution-

> al rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him."

Insofar as this appeal reviews the order dismissing Helfant's appeal for failure to state a claim upon which relief may be granted these factual allegations must be taken as true.

The opposing affidavits filed by the state defendants in opposition to Helfant's motion for a preliminary injunction do not dispute any of the historical factual allegations of the Complaint quoted above, except that defendant Hayden avers:

> "I had no knowledge that Helfant was to appear before the New Jersey Supreme Court until I was called by the Supreme Court on November 6, 1972 and told that Helfant might be a few minutes late for his grand jury appearance."

Read in the light most favorable to those defendants, the affidavits do tend to suggest that Helfant's testimony before the grand jury was the result of a voluntary waiver of his privilege against self incrimination rather than of any compulsion by the Supreme Court. It is fair to say that for purposes of the motion for a preliminary injunction, whether Helfant's testimony was the result of

compulsion was put in issue and that this issue could be resolved only by an evidentiary hearing.

At the evidentiary hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. On the disputed issue of compulsion to testify before the grand jury this testimony by Helfant is relevant:

> "Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.
>
> Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?
>
> Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.
>
> Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Peskoe took me from her office to the Supreme Court Chambers or conference room, not the Chambers.
>
> Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge,

I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today? A. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify."

The district court denied preliminary relief and dismissed the complaint on the ground that *Younger* v. *Harris,* 401 U. S. 371 (1971) precluded federal intervention. In the posture in which the case is before us, the district court has ruled only on the legal sufficiency of the complaint, and has not made any findings of fact. Whether or not Helfant's testimony before the grand jury was voluntary or coerced is a crucial fact issue. Although no testimony was offered by the state defendants, on that crucial fact issue the district court, had it made factual findings, might have found Helfant's testimony not credible, and might on this ground have declined to issue a preliminary injunction. But for purposes of a motion to dismiss pursuant to Rule 12(b)(6) that possibility is irrelevant. In reviewing the order granting that motion we must take as true Helfant's contention that he was

coerced by the Supreme Court of New Jersey into testifying before the grand jury and that he is about to be tried on an indictment resulting from that coerced testimony. The record establishes that a trial court has declined to quash the indictment and that attempts to obtain interlocutory appellate relief in the New Jersey courts have been unavailing. Even if at a later stage a New Jersey trial court were to quash the indictment the state could appeal that decision to the Supreme Court of New Jersey. *See, e.g., State* v. *Winne,* 12 N. J. 152 (1953).

Younger v. *Harris, supra,* holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or ". . . other extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 53. *See Lewis* v. *Kugler,* 446 F. 2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 447 F. 2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the *Younger* v. *Harris* line of cases is predicated upon the fundamental assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced

from him by the Supreme Court of New Jersey, his fifth amendment privilege against self incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey, and ultimately in that Court, hardly seems adequate.

We hold, then, that *Younger* v. *Harris, supra* did not require the dismissal of the complaint. That holding requires a reversal and remand.

The order denying the preliminary injunction is also predicated upon *Younger* v. *Harris, supra.* We did not hear the testimony of Mr. McGahn and Mr. Helfant, and we cannot judge the credibility of Helfant's testimony that he was coerced. At the same time, on the record before us his testimony is not contradicted except by affidavits, and those affiants have not been cross examined. The record is sufficient to suggest that the status quo be preserved until such time as the district court can make findings of fact. Mindful that present or even potential interference with a pending state prosecution is a matter of utmost gravity, this case should on remand receive accelerated consideration and the court should enter an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits. Rule 65(a)(2) Fed. R. Civ. Proc.

At the oral argument on this appeal we asked the attorney for the appellees if the State intended to commence the trial of the indictment, now scheduled for September 10, 1973, while this appeal was *sub judice.* We were advised that this was the State's intention. Accordingly we

issued an order enjoining commencement of the prosecution until such time as we could decide the appeal.

The order dismissing the compiaint will be reversed. The order denying the motion for a preliminary injunction will be vacated, and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits. We direct that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this court. The mandate of this court shall issue forthwith.

ARLIN M. ADAMS, *Circuit Judge,* concurring:

I concur in the result reached by the majority in this matter. Although the doctrine of *Younger* v. *Harris* generally precludes a federal district court from enjoining a criminal proceeding already under way in the state court, there are limited exceptions to this wise rule of comity. One of those exceptions, as I read *Younger,* arises when "extraordinary circumstances" or "unusual circumstances," 401 U. S., at 53 and 54, exist. As the recitation set forth in the majority opinion demonstrates, it would seem to me that such extraordinary or unusual circumstances are asserted here so as to make it appropriate for the district court to proceed with findings of fact and conclusions of law.

The plaintiff claims, both in his pleadings and in his evidence, that he was coerced by members of the State

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that as a result, he was indicted because of his allegedly coerced testimony. He sought, in the state court, to have the indictment dismissed because it was based on the coerced testimony, but his motion was refused, and the state appellate courts declined to entertain his appeal.

If the district court should determine, after an appropriate evidentiary inquiry, that this plaintiff's Fifth Amendment right *has* been abridged, in the factual setting of this case an exception to Younger's precept of non-interference would obtain.[1]

[1] Although the plaintiff names as defendants the Justices of the Supreme Court of New Jersey as well as that State's Attorney General, the final injunction, if issued, may be limited to the Attorney General, prohibiting him from continuing criminal proceedings against plaintiff. It should also be noted that plaintiff does not seek money damages.

Order of United States District Court for the District of New Jersey Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 607-73

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, *et als.*,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., co-counsel for the plaintiff, Edwin H. Helfant, an Application for an Injunction against a State Court criminal proceeding under 42 United States Code Annotated Section 1983 and under 28 United States Code Annotated Section 1343, and cross motion having been made by the defendants to dismiss the complaint on the grounds that the court does not have jurisdiction and on the grounds that the complaint does not state a claim upon which reilef can be granted, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General of the State of New Jersey, attorney for the defendants, and argu-

Order of United States District Court for the District of New Jersey Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

ment having been considered together with briefs, affidavits, certified pleadings and oral testimony having been heard,

It Is, on this 9 day of May, 1973

Ordered and Adjudged that the United States District Court for the District of New Jersey has jurisdiction over the subject matter.

It Is Further Ordered and Adjudged that the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted be and is herewith Granted. Application for stay pending appeal is denied.

John J. Kitchen
Judge, U. S. District Court

I consent to the entry of the above Order.

Edward C. Laird
Deputy Attorney General

I consent to the form of the above Order.

Marvin D. Perskie
Co-Counsel for Plaintiff, Edwin H. Helfant

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J., Dismissing Complaint, dated May 9, 1973

The Court: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those injuries that are usually incidental to every criminal proceeding. Third: That the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J. Dismissing Complaint, dated May 9, 1973

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to state a claim is hereby granted.

Oral Opinion of the Honorable John J. Kitchen, U.S.D.J. Dismissing Complaint, dated May 9, 1973

You may prepare the order Mr. Laird.

Mr. Perskie: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

The Court: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

Verified Complaint, dated May 2, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO.

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Defendants.

The plaintiff, Edwin H. Helfant, residing at Green Lantern Motel, Somers Point, Atlantic County, State of New Jersey, by way of complaint says:

1. Plaintiff is a citizen of the United States and resides in Atlantic County, New Jersey. All defendants herein are residents of the State of New Jersey.

2. Defendants, George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy

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Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., Mark A. Sullivan, of the Supreme Court of New Jersey and The State of New Jersey, deprived plaintiff of privileges and immunities guaranteed to every citizen of the United States, including plaintiff, by Amendment 5 and Section 1 of Amendment 14 of the Constitution of the United States, and by reason thereof, this Court has jurisdiction under 42 U.S.C.A., Section 1983 and 28 U.S.C.A. Section 1343.

3. The plaintiff herein, Edwin H. Helfant, is a member of the Bar of the State of New Jersey and a former municipal court judge.

4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury investigation, inter alia, into an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the defendant was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the U. S. Constitution and refused to testify. See attached exhibit.

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6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amend-

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ment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State

and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation.

10. To date, the Deputy Attorney General has not indicated what was the purpose for his immediately visiting the Supreme Court chambers after the plaintiff had left there, but on being confronted with the facts in open court, has resorted to an illusory "right of privacy" and an alleged right of interdepartment privilege and communication which is not only non-existent but violative of the basic constitutional concept of separation of power. (See attached exhibits.) Nor has this defendant denied his communications with the Supreme Court about plaintiff during a pending Grand Jury investigation, nor his revelation of raw Grand Jury evidence about plaintiff to them and his violating the secrecy of the Grand Jury, but has sought to justify same.

11. On January 17, 1973 an indictment was returned by the same State Grand Jury aforedesignated against the plaintiff herein, charging him with conspiracy, obstruction of justice, aiding and abetting the compounding of a crime, and *four counts of false swearing.*

12. On April 6, 1973 the Trial Court entered two orders denying plaintiff's previously made motions to dismiss the indictments and counts thereof, based upon the intrusion

of the Deputy Attorney General into the Supreme Court chambers, and his acquaintance of the New Jersey Supreme Court with the factual matters involved in a pending State Grand Jury investigation and the resultant coercive actions of both the Deputy Attorney General and the Supreme Court which deprived plaintiff of the voluntary exercise of his Fifth Amendment rights.

13. The plaintiff then filed two motions for leave to appeal the orders of the Trial Court aforesaid with the Appellate Division of New Jersey on April 16, 1973 and April 23, 1973 and a motion for leave to appeal these unheard motions and for certification from the Supreme Court on April 26, 1973.

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of

his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. The conclusion must be that the State is engaging in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.C.A., Section 2283.

15. The plaintiff was arraigned on the Indictment SGJ 10-72-10 in this case on February 2, 1973. Trial on this indictment has been peremptorily set for May 14, 1973 and Trial Judge Arthur Salvatore has refused to grant any continuance for trial.

16. The State of New Jersey is made a party hereto so that complete relief may be afforded.

17. The plaintiff has been denied due process of law and fundamental fairness referable to the actions of the defendants herein.

18. Just today (May 2, 1973) there was received from the Deputy Attorney General a motion returnable on May 11, 1973 in Trenton, completely reversing his posi-

Verified Complaint dated May 2 1973

tion heretofore made during preliminary motions in this case with regard to the introduction of testimony of the co-defendant of the plaintiff in the criminal action in the State of New Jersey.

WHEREFORE, plaintiff demands judgment as follows:

a) A temporary and permanent injunction restraining defendants from further prosecuting or proceeding on any charges arising out of and including Indictment No. SGJ 10-72-10;

b) For a temporary restraining order restraining the defendants from prosecuting said charges insofar as they apply to plaintiff until this matter can be heard and determined, and

c) For any other relief the Court may deem just and fair.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE
Co-Counsel for Plaintiff
By: MARVIN D. PERSKIE

Dated: May 2, 1973

(Verified by Edwin H. Helfant on April 27, 1973.)

State of New Jersey Indictment

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—CRIMINAL

STATE GRAND JURY NUMBER SGJ 10-72-10

DOCKET NUMBER .....

INDICTMENT

STATE OF NEW JERSEY

v.

EDWIN H. HELFANT, SAMUEL MOORE

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; knowingly, willfully and corruptly did conspire, confederate and agree together, with each other, and with John Cantoni, Shelly Kravitz, John Anderson, Harold Garber, Richard Cantoni, also known as Babe, Dominick Perri

and William H. Hicks who are named as co-conspirators but not as defendants herein, to commit acts for the perversion and obstruction of justice and due administration of the laws; the said Edwin H. Helfant and the said Samuel Moore then and there knowing that a criminal complaint in the case of State v. John Cantone, Docket No. C-251 for 1968, was pending in the Municipal Court of the City of Egg Harbor City aforesaid, the said matter involving a charge that John Cantoni did commit atrocious assault and battery upon William H. Hicks and Eugene Summerson on March 17, 1968; and the said Samuel Moore then and there being the Municipal Court Judge in the City of Egg Harbor City; that is, knowingly, willfully and corruptly to use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court of Egg Harbor City, favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, thereby interfering with the goals and aims of the judicial process and denying the public the benefits and protections of the criminal laws of the State of New Jersey, to the obstruction, hinderance and impedance of the due course of public justice.

It was a part of the said conspiracy that William H. Hicks would withdraw the aforesaid complaint, drop the charge of atrocious assault and battery and not continue the criminal prosecution.

It was further a part of the said conspiracy that the said Samuel Moore would violate the duties of his judicial office which he was sworn and required by law to uphold, including the duties imposed by N.J.S.A. 2A:8-23, R.R. 8:4-10 of Court Rules, and the Municipal Court

Manual, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by willfully misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint.

The Grand Jurors aforesaid, upon their oaths, do further present that in execution of the said conspiracy and to effect the objects thereof, the following overt acts were committed:

OVERT ACTS

1. On or about March 17, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did communicate by telephone with Shelly Kravitz and then and there Edwin H. Helfant did tell Shelly Kravitz that he wanted to meet him the following day and discuss the assault by John Cantoni upon William H. Hicks which had occurred earlier that morning.

2. On or about March 18, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant did say that if John Cantoni paid the sum of $5,000 he would see to it that no charges were pressed.

3. On or about March 18, 1968, Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, did communicate with John Cantoni and did relate to him a conversation he had with Edwin H. Helfant.

State of New Jersey Indictment

4. On or about March 19, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant stated that if John Cantoni paid the sum of $3,000 charges would not be pressed for the assault by John Cantoni against William H. Hicks, but if the money were not paid he would personally prosecute the case before Judge Moore in Egg Harbor City.

5. On or about March 19, 1968, at the City of Atlantic City, in the County of Atlantic, Shelly Kravitz did meet with John Cantoni and did relate to him the conversation he had with Edwin H. Helfant earlier that day.

6. Between on or about March 29, 1968, and on or about April 21, 1968, at the City of Somers Point, in the County of Atlantic, Richard Cantoni, also known as Babe, did meet with Edwin H. Helfant and did discuss the payment of a sum of money by John Cantoni to Edwin H. Helfant in return for the withdrawal of the complaint filed against John Cantoni by William H. Hicks.

7. Between on or about April 21, 1968, and on or about June 5, 1968, John Cantoni did meet with Harold Garber at the Algiers Lounge at the City of Atlantic City, in the County of Atlantic, and then and there they did discuss the paying of money to Edwin H. Helfant by John Cantoni for the withdrawal of the complaint filed by William H. Hicks against John Cantoni.

8. At the end of May or the beginning of June, 1968, at the City of Atlantic City, in the County of Atlantic, John Cantoni did give $1,700 to John Anderson.

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9. On or about June 7, 1968, at the City of Somers Point, in the County of Atlantic, William H. Hicks did recieve a sum of money in the amount of $1,500 from Edwin H. Helfant.

10. Between on or about June 7, 1968, and on or about July 20, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel Moore did direct Alolph Joseph to write the words "We do hereby withdraw the within complaint against John Contoni" on the back of the complaint filed against John Cantoni by William H. Hicks, in the case of State v. John Cantone, Docket No. C-251 for 1968, and Samuel Moore did then take the complaint from the Municipal Court of Egg Harbor City.

11. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, William H. Hicks did sign his name on the back of the complaint he filed against John Cantoni charging Cantoni with atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for 1968, under the printing: "We do hereby withdraw the within complaint against John Cantone" and above the typing "William H. Hicks".

12. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did sign his name on the back of the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, over the typing "Witness as to Eugene Summerson".

13. On or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel

Moore did return the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, to Adolph Joseph, did show him the signature and typing on the back of the complaint and did tell Adolph Joseph that permission had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and that the signature over the typed lines "Witness as to William H. Hicks" and "Witness as to Eugene Summerson" were those of people from the Atlantic County Prosecutor's Office.

All in violation of N.J.S. 2A:98-1 and N.J.S. 2A:98-2, and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City; and the said Edwin H. Helfant and Samuel Moore then and there knowing that a matter was pending in the Municipal Court for the City of Egg Harbor City, the said matter involving a criminal complaint which was filed by William H. Hicks and Eugene Summerson against John Cantoni charging atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for

1968; and the said Edwin H. Helfant and Samuel Moore contriving and intending to obstruct, hinder and impede the due course of public justice and the due administration of laws in the said matter; willfully, knowingly and corruptly did use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court for the City of Egg Harbor City favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey in the said matter, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by intentionally misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; to the obstruction, hinderance and impedance of the due course of public justice; all in violation of the provisions of N.J.S. 2A:85-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT III

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Edwin H. Helfant then and there

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knowing that a criminal complaint was pending in the Municipal Court of Egg Harbor City aforesaid, in the case of State v. John Cantone, Docket No. C-251 for 1968, the criminal complaint charging that John Cantoni did commit atrocious assault and battery upon the said William H. Hicks and Eugene Summerson at the City of Egg Harbor City, on March 17, 1968, in violation of N.J.S. 2A:90-1, the said allegation that John Cantoni committed atrocious assault and battery upon William H. Hicks and Eugene Summerson being a true, accurate and valid charge of an offense indictable at law in New Jersey, did willfully and knowingly aid, abet, counsel, command, induce, procure, and cause William H. Hicks to accept, take, and receive a sum of money to compound an indictable offense under the laws of the State of New Jersey, that is, for William H. Hicks to withdraw the aforesaid complaint, to drop the charges and not to continue the criminal prosecution for the said indictable offense in return for the receipt by him of a sum of money, in violation of N.J.S. 2A:97-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City, aforesaid, and the said Samuel Moore then and there having by reason of such public office the duties, among others,

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to display good faith, honesty and integrity and to be impervious to corrupting influences, and to enforce the laws of the State of New Jersey to the best of his ability, uninfluenced by motives adverse to the best interests of the City of Egg Harbor City, the County of Atlantic, and the State of New Jersey, to transact the business of his said public office frankly and openly in the light of public scrutiny so that the public may know and be able to judge him and his work fairly; to abide by the commands in the Canons of Judicial Ethics to promote justice, to conduct himself above reproach, to administer justice according to law and not to allow other affairs or private interests to interfere with the prompt and proper performance of his judicial duties; and to abide by N.J.S. 2A:8-23, and the 1968 New Jersey Court Rules, R.R. 8:4-10, and the Municipal Court Manual requiring that a complaint pending in a municipal court wherein an offense indictable at law is charged not be discharged and dismissed without giving the County Prosecutor prior notice and an opportunity to be heard; did knowingly, willfully, and corruptly engage in misconduct in his said public office; that is, the said Samuel Moore did breach and violate the aforesaid duties by using the power and influence of his said public office to obtain action in the Municipal Court of the City of Egg Harbor City favorable to John Cantoni and against the interests of the State of New Jersey, the County Atlantic and the City of Egg Harbor City, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of a complaint charging atrocious assault and battery, a high misdemeanor and an indictable offense, in the case of State v. John Cantone, Docket No. C-251 for 1968, without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic

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County Prosecutor with an opportunity to be heard; and by misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; in violation of N.J.S. 2A:85-1, and against the peace of this State, the government and dignity of the same.

COUNT V

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on October 25, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing in the manner and form following to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-17) and obstruction of justice (N.J.S. 2A:85-1), and which investigation the Grand Jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Samuel Moore was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Samuel Moore then and there taking the oath that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but

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the truth, and the foreman then and there having competent authority to administer such oath to the said Samuel Moore in that behalf.

3. Upon the said Samuel Moore being sworn, it was then and there inquired about the knowledge of the said Samuel Moore about a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, and the manner in which the aforesaid complaint was dismissed without the approval or the knowledge of the Atlantic County Prosecutor's Office.

4. In reference to the aforementioned matter under inquiry the said Samuel Moore then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in effect that in 1968 he had no knowledge of and did not participate in the disposition of the aforesaid complaint, that is, that he never saw the aforesaid complaint, that he never directed Adolph Joseph to make any writing on the back of the complaint, that he never took the complaint from the Municipal Court of the City of Egg Harbor City, that he never told Adolph Joseph that approval had been given by the Atlantic County Prosecutor's Office to dismiss the complaint and that he never authorized the dismissal of the aforesaid complaint, as follows:

> Q. Did you in June of 1968 instruct Ady Joseph to write, "We do hereby withdraw the within complaint against John Cantoni"?
>
> A. Oh, no, impossible.
>
> Q. You are absolutely certain?
>
> A. Absolutely impossible. I couldn't possibly do such a thing.

Q. You never saw this complaint before—

A. August of this year.

Q. You never instructed Mr. Joseph to print, "We do hereby withdraw the within complaint against John Cantoni"?

A. No, sir.

Q. Did you after instructing Mr. Joseph to do that printing, follow the complaint up?

A. What was that?

Q. I said, did you, after having instructed Mr. Joseph to print it—

A. I didn't do such a thing.

Q. Did you—okay, strike that, excuse me.

Did you ever, after showing the complaint to Mr. Joseph follow the complaint up?

A. I didn't see the complaint until August of this year. I just testified that I did not see these papers until August of this year. So I couldn't possibly have talked to Mr. Joseph or directed him to do anything as far as these papers are concerned.

Q. Judge, I'm going to ask the questions and you, if you didn't do it, you could say you did not do it.

A. Yes, sir.

Q. Did you ever follow that complaint up and tell Mr. Joseph you were going to take it to the Atlantic County Prosecutor's Office to have them authorize the withdrawal of that complaint?

A. No, sir.

Q. Did there ever come a time, Judge Moore, that in July of 1968 Mr. Joseph asked you what happened to the complaint, that in June you told him you were going to take it to the prosecutor's office, and you told him you forgot about it, but that you will get the authorization from the prosecutor's office?

A. That's a deliberate lie if that were said.

Q. Judge Moore, did there ever come a time in September of 1968 where you brought that complaint back and told Mr. Joseph that the complaint had been withdrawn by Hicks and Summerson and that those were their signatures?

Excuse me, on the right-hand side, William Hicks and Eugene Summerson and the signature witness as to Hicks and the witness as to Summerson was the authorization from the Atlantic County Prosecutor's Office to withdraw the

A. Anybody who made that statement, it's a deliberate lie. I'm one of the few people, and probably the only one who can recognize Helfant's signature. That's his signature there.

If I had anything to do with the complaint and these signatures, I certainly wouldn't stand for Helfant, a municipal judge, signing as a witness for dismissing an indictable offense, which would be improper. I can't understand Helfant's doing such a thing. That's stupidity.

Q. Judge, again, just to get your—what appears to be your denial on the record—did you tell Mr. Joseph that you received authorization from the Atlantic County Prosecutor's Office to withdraw the complaint and that the signatures on the left-hand side of the complaint, witness as to William H. Hicks, witness as to Eugene Summerson dated July 20, 1968 were the signatures of the prosecutor's office authorizing the withdrawal of the complaint?

A. No.

Q. No, sir, you do not?

A. No, sir.

Q. Now, do you recognize any of the signatures on this complaint?

A. The only signature I recognize is Helfant. I don't know Hick's signature, Summerson's signature. I never saw Hicks in my life until about five weeks ago. I don't know who this man is, Parri. I don't even know what the name is. I never saw that before.

Q. And whose signature is it over the line, "Witness as to Eugene Summerson"?

A. That's Edward Helfant.

Q. Have you seen Helfant's signature before?

A. Oh, yes, I had a copy of it. I went to the bank about a month ago, they had just cashed a check of his. I had a photocopy made of it. It disappeared somehow or other, but that's his signature.

Q. Judge, is there any doubt in your mind that that's Mr. Helfant's signature?

A. No doubt at all.

Q. Again, Judge, for the record, this complaint says, "Returned 9/10/68." Do you recognize the printing, "Returned"?

A. No, sir.

Mr. Joseph told me he wrote that.

Q. Is that your printing?

A. No, sir.

Q. Did you give the complaint back to Mr. Joseph on 9/10/68 and tell him to enter a dismissal on the docket?

A. No, sir; no, sir.

Q. Judge, would the fact that Mr. Joseph testified under oath before this grand jury, that in June of '68 you authorized him to write on Exhibit 1, "We do hereby withdraw the within complaint

against John Cantoni", that subsequently you said you were taking it to the prosecutor's office, that subsequently he asked you in July what happened to the complaint and you told him you had forgotten about it, you were going to get authorization, and that on September 10, 1968 you returned the complaint to him and told him that the signatures on the left-hand side were from the Atlantic County Prosecutor's Office that authorization had been granted to dismiss the complaint and that he was to enter a dismissal on the docket.

Would that testimony or my representation that that was Mr. Joseph's testimony on the record, refresh your recollection as to any of the events you testified about?

A. That's a deliberate lie.

Q. Does that representation as to Joseph's testimony refresh your recollection?

A. I can't—no, no recollection, no refreshing necessary. That is a lie because I never saw these papers until August of 1972.

Q. So, in other words, in spite of what Mr. Joseph had indicated and in spite of what you told us about Mr. Joseph being a good clerk and truthful man as far as you knew, it's now your contention he purjured himself before the grand jury?

A. He certainly did;

whereas in truth and in fact the said Samuel Moore in 1968 did have knowledge of and did participate in the disposition of the aforesaid complaint, that is, the said Samuel Moore knew of the existence of the aforesaid complaint in 1968, did direct Adolph Joseph to make certain writings on the back of the complaint, did in fact take the

complaint from the Municipal Court for the City of Egg Harbor City, did tell Adolph Joseph that approval had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and did authorize the dismissal; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VI

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury, which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-1), and which investigation the grand jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Edwin H. Helfant was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Edwin H. Helfant then and there taking the oath that the evidence which he should give

to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and there having competent authority to administer such oath to the said Edwin H. Helfant in that behalf.

3. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into how and under what circumstances a signature purporting to be that of William H. Hicks was placed upon a certain release, dated June 7, 1968, which discharged John Cantoni from any claim, or claims, or causes of action emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey, in 1968.

4. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, that the aforementioned release was signed in his presence on June 7, 1968 by William H. Hicks, as follows:

Q. I show you State Grand Jury Exhibit No. 11.
A. Yes, sir.
Q. Do you recognize that document?
A. Yes, sir.
Q. And what is that document?
A. It's a release that I prepared.
Q. Did you dictate it?
A. I don't know if I dictated it or I told Jane to prepare a release and gave her the terms.
Q. Well, most of it is kind of formal?
A. Yes, it's a formal release.
Q. "And more particularly from any claim or claims or causes of action whatsoever, emanating

from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey on the day of , 1968."

Did you dictate that language?

A. Could be, or else Jane put it in there on her own. I mean, she knows how to prepare a release.

Q. She would have access to this information?

A. I would have given her the date and told her what, and she would have just prepared it.

Q. And did Hicks sign this release in your presence?

A. In my presence and in the presence of Jane Durham (D-u-r-h-a-m).

Q. And this is the 7th day of June?

A. Whatever date is on that instrument is the date it was signed.

Q. Well, see, if the 7th day of June—

A. 7th day of June. And that's filled in by Jane.

Q. So this must have taken place at your office?

A. Yes;

whereas in truth and in fact, the said Edwin H. Helfant then and there well knew that the release was not signed in his presence on June 7, 1968, by William H. Hicks and the signature on the release which he was shown in the grand jury was a forgery; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of

Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired whether he had affixed his signature to the back of a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, over a typed line reading: "Witness as to Eugene Summerson".

3. In reference to the aforementioned matter under inquiry the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that the signature he was being questioned about was not his, as follows:

Q. I show you a signature under which is typed "Witnessed as to Eugene Summerson", and I ask you if you recognize that signature?

A. I do not, sir.

Q. Mr. Helfant, is that your signature?

A. No. This is not my signature.

Q. Are you absolutely certain of that?

A. One hundred percent certain. On my life, that's not my signature;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that the signature on the back of the aforesaid criminal complaint over the typing

State of New Jersey Indictment

"Witness as to Eugene Summerson" was his signature; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VIII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into if he ever had a discussion in 1968 with Richard Cantoni, also known as Babe, at the Green Lantern Motel about dropping the criminal charges against John Cantoni in return for the payment of a sum of money.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony in the effect that he never met Richard Cantoni, also known as Babe, and never had any discussion with him about the criminal charges pending against John Cantoni, as follows:

State of New Jersey Indictment

Q. Any discussion with Babe Cantoni about this case?

A. Do not know Babe Cantoni.

Q. Any discussion with a man who came to you at the Green Lantern?

A. Nobody ever came to me at the Green Lantern.

Q. If I were to tell you that Babe Cantoni has indicated that he came to you and discussed with you how much you wanted to drop the charges and you said $5,000.00 or Cantoni will go to jail, does that refresh your recollection?

A. That would have been an untrue statement because it never happened.

Q. Never happened?

A. Never happened.

Q. Never saw Babe Cantoni?

A. Don't know Babe Cantoni.

Q. Just know his name?

A. Only from what Mr. Lipman told me, that he represented the vending machine company and that this is how he got into the case, that's the only time I heard the name Babe Cantoni.

Q. You are absolutely certain that Babe Cantoni never came to you and asked you how much money you wanted to drop the charges?

A. Absolutely certain;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he had met with Richard Cantoni, also known as Babe, at the Green Lantern Motel in 1968 and had discussed with him the dropping of criminal charges against John Cantoni for atrocious assault and battery in return for the payment by John

State of New Jersey Indictment

Cantoni of a sum of money to Edwin H. Helfant; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT IX

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into whether Edwin H. Helfant ever met with Shelly Kravitz and discussed with him the dropping of criminal charges against John Cantoni in return for the payment of money to Edwin H. Helfant.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that he never met with Shelly Kravitz and had discussions with him about the criminal case involving John Cantoni, as follows:

Q. Do you know a man by the name of Shelly Kravitz?

A. Yes, sir.

State of New Jersey Indictment

Q. How long have you known Kravitz?

A. I would say about seven or eight years.

Q. Did you ever have any discussion with Shelly Kravitz about this case?

A. Absolutely not.

Q. A day or two after that beating or this injury to Mr. Hicks, did you call Mr. Kravitz and tell him you wanted to see him in your office?

A. Absolutely not.

Q. When Kravitz first came to see you in your office, did you tell Kravitz that Cantoni had to get some money up or you would go to quote "Personally prosecute the case"?

A. Kravitz never came to my office. And I never discussed this case with him.

Q. Did you ever tell Shelly Kravitz or anybody else you were going to "personally prosecute this case", before Judge Moore, unless Cantoni came up with the money?

A. Not alone didn't I say that, it wouldn't be possible.

Q. I don't particularly care whether or not that was possible. Did you or did you not say that?

A. I never said any such thing, never discussed this case with Shelly Kravitz at all.

Q. Did you tell Shelly Kravitz in a subsequent conversation, unless Cantoni came up with the money you were going to see he was going to be put in jail?

A. I never said any such thing.

Q. That would have been extortion?

A. I don't know about extortion, it would have been an improper statement.

State of New Jersey Indictment

Q. It would be compounding a felony, wouldn't it?
A. Most likely;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he did meet in 1968 with Shelly Kravitz and had discussions with him about the dropping of criminal charges against John Cantoni for atrocious assault and battery against William H. Hicks in return for the payment of a sum of money; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

EVAN WILLIAM JAHOS,
Assistant Attorney General and
Director of the Division of
Criminal Justice

A TRUE BILL:

CARL F. PENNIPEDE,
Foreman

JOINT APPENDIX

Supreme Court, U. S.
FILED
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

[No. 74-80]

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

[No. 74-277]

EDWIN H. HELFANT,

Cross-Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 6, 1974
PETITION FOR CERTIORARI GRANTED NOVEMBER 18, 1974
CROSS-PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1974
CROSS-PETITION GRANTED NOVEMBER 18, 1974

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APPENDIX

Docket Entries, United States Court of Appeals for the Third Circuit

GENERAL DOCKET

APPEAL FROM DISTRICT OF NEW JERSEY (CAMDEN)

CASE No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

No. Below: D. C. Civil 607-73

Judge Below: John J. Kitchen

Date of Judgment:

Notice of Appeal filed: May 11, 1973

Commenced in D. C. 5-3-73

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-11-73	Copy of Notice of Appeal, rec'd. from counsel, filed.
	Motion by appellant seeking injunction pending appeal, for an order granting a stay and injunction pending criminal proceedings in New Jersey Superior Court under Indictment No. SGJ 10-72-10, from the District Court order denying relief and dismissing complaint dated May 9, 1973, filed. (4 copies).
	Affidavit of service of above motion by appellant by hand delivery on May 10, 1973, filed.
5-14-73	Copy of Notice of Appeal ,rec'd. from D.C., filed.
5-14-73	Letter-Answer, dated May 14, 1973, from counsel for appellees to appellant's motion seeking injunction pending appeal, etc., filed. (1 copy), Proof of service in letter-answer.
5-14-73	Documents filed in the District Court, Motion to Dismiss Complaint, and supporting brief in support of appellees' letter-answer, rec'd. for the information of the Court. (4 copies).
5-14-73	Submitted on appellant's motion seeking injunction pending appeal., for an order granting a stay and injunction pending criminal proceedings, etc., Coram; Van Dusen, Gibbons and Rosenn.
5-16-73	Appearance of Marvin D. Perskie, Esq.; and Patrick T. McGahn, Jr., Esq.; Perskie and Callinan for appellant, filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-17-73	Order (*Van Dusen,* Gibbons and Rosenn) denying appellant's motion seeking injunction pending appeal, for an order granting a stay and injunction pending criminal proceedings in New Jersey Superior Court under Indictment No. SGJ 10-72-10, from the District Court order denying relief and dismissing complaint dated May 9, 1973, filed.
5-17-73	CC of above order to C of D.C.
5-17-73	Record and Exhibits, rec'd. May 15, 1973, filed.
5-18-73	Appearance of Edward C. Laird, Esq. for appellees, filed.
6-11-73	Copy of letter dated June 8 rec'd from Clerk of Supreme Court advising that a motion for injunction pending disposition of Third Circuit Court of Appeals was denied by Mr. Justice Brennan.
6-25-73	Brief for appellant and appendix, filed. (25 cc.). Affidavit of service by mail on June 21, 1973 attached to brief.
7-24-73	Brief for appellee (and appendix red'd. for information of the Court), filed. Affidavit of service by mail on July 23, 1973 attached.
7-30-73	Letter in lieu of reply brief for appellant, filed. (25 copies). Proof of service in letter.
8- 2-73	Motion by appellant, with affidavit in support, to schedule appeal for an immediate hearing,

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	so that a decision may be rendered prior to September 10, 1973, filed. (5 cc.). Proof of mailings attached.
8- 6-73	Memorandum in Opposition by appellees to appellant's motion, filed. (5 cc.). Affidavit of service attached.
8- 6-73	Submitted on above motion. Coram: Adams and Rosenn.
8- 8-73	Order (*Adams* and Rosenn) granting appellant's motion to schedule appeal for an immediate hearing so that a decision may be rendered prior to September 10, 1973, and the case will be listed for disposition on the merits during the week of September 4, 1973, filed.
8-21-73	Letter dated August 20, 1973 rec'd from Marvin D. Perskie, Esq. for the information of the Court.
9- 7-73	Argued. Coram: Staley, Adams and Gibbons.
9- 7-73	Order (Staley, *Adams* and Gibbons) staying the state criminal action until further order of this court, which shall be entered no later than September 12, 1973, filed.
9- 7-73	Certified copy of above order to C. of D.C.
9-10-73	Opinion Per Curiam (Staley, Adams and *Gibbons*), (with *Adams* concurring), filed.
9-10-73	Judgment (Staley, Adams and Gibbons), attested by *Clerk,* reversing the order of the

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	district court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted; vacating the order of the District Court, filed May 9, 1973, which order denied plaintiff's motion for a preliminary injunction and remanding the cause to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with the trial on the merits; and directing that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within 30 days from the date of the mandate of this court, all in accordance with the opinion of this Court, filed.
9-10-73	Order, attested by *Clerk,* directing that the certified judgment in lieu of formal mandate issue forthwith, in accordance with the opinion of this Court, filed.
9-10-73	Order (Staley, *Adams* and Gibbons) vacating this Court's order of September 7, 1973, which stayed the proceedings in the State Court, filed.
9-10-73	Certified judgment in lieu of formal mandate issued.
9-10-73	Certified copies of orders filed September 10, 1973 to C. of D.C.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
9-10-73	Record and exhibits returned to C. of D.C.
9-12-73	Receipt for record and exhibits rec'd from C. of D.C., filed.
9-19-73	Application by appellee for an order staying the judgment in lieu of mandate pending disposition of petition for rehearing en banc, considered by counsel for appellant as a motion to recall mandate, filed. (4 cc.). Proof of service attached.
9-19-73	Brief and appendix for appellee in support of application for an order staying the judgment in lieu of mandate, etc., filed. (4 cc.). Proof of service attached to application.
9-21-73	Order (Staley, Adams and *Gibbons*) recalling the mandate of this Court pending the filing by appellees of petition for rehearing en banc and the disposition by this Court of such petition, filed.
9-21-73	Certified copy of above order to C. of D.C.
9-25-73	Motion by appellees for leave to file petition for rehearing in excess pages, filed. (4 cc.). Affidavit of service attached.
9-26-73	Motion by appellees, with affidavit in support, for leave to file their petition for rehearing as within time, or alternatively, filing the petition for rehearing out of time, filed. (4 cc.) Affidavit of service attached.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
9-26-73	Motion by appellant, with affidavit in support, for an order restoring the mandate, filed. (5 cc.). Proof of mailing attached.
10- 4-73	Order (Adams, *Gibbons* and Staley) granting appellees' motion for leave to file their petition for rehearing out of time; and denying appellant's motion for an order restoring the mandate, filed.
10- 4-73	Petition for rehearing en banc, rec'd September 25, 1973, filed. (25 cc.). Certificate of service by mail on September 24, 1973 attached to petition.
10-31-73	Order (Seitz, Chief Judge, Staley, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn, Hunter, Weiss, Garth, Circuit Judges) denying petition for rehearing en banc; vacating the judgment of this Court, directing the Clerk of this Court to list this case for submission to a panel consisting of Judges Staley, Adams and Gibbons pursuant to Rule 12(6) on November 19, 1973; and directing the parties to, simultaneously, on or before November 10, 1973, file with this Court, supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on that ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof; see *Gelbard* v. *U.S.,* 408 U.S. 41, 60 (1972); *U.S.* v. *Blue,* 384 U.S. 251, (1966); *Lawn* v. *U.S.,* 355 U.S. 339 (1958);

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
	compare *Garrity* v. *New Jersey,* 385 U.S. 493, (1967), filed.
10-31-73	Certified copy of above order to Clerk of District Court.
11- 7-73	Supplemental brief for appellant (and appendix), filed. (25 copies)
11-10-73	Supplemental brief for appellees, rec'd November 13, 1973, filed. (25 copies)
11-13-73	Letter dated November 12, 1973 enclosing opinion of Sixth Circuit in *U.S.* v. *Calandra,* No. 71-1999, decided July 27, 1972, rec'd from Marvin D. Perskie, Esquire for the information of the Court.
11-15-73	Motion by appellant to expunge supplemental brief, filed. (6 copies) service attached.
11-19-73	Submitted on rehearing before the Original Panel. Coram: Staley, Adams & Gibbons, Circuit Judges.
11-19-73	Motion by appellees to strike Affidavit of Samuel Moore which is annexed to appellants' supplemental brief and appendix and
	Brief in Support of motion to Strike Affidavit, filed. (4 copies) service attached.
11-19-73	Brief and Affidavit in Opposition to motion to strike affidavit of Samuel Moore rec'd from counsel for appellant, filed. (5 copies) service attached.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
11-21-73	Letter dated November 19, 1973 rec'd from David S. Baime, Esquire for the information of the Court.
11-21-73	Affidavit of Appellees in Opposition to appellants' motion to Expunge supplemental brief, filed. (4 copies) service attached.
11-27-73	Letter dated November 26, 1973 with enclosure, full context of S.C. of U.S. opinion in *Lefkowitz, et al., Appellants* v. *M. Russell Turley, et al.,* decided 11-19-73 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
11-27-73	Reply brief of appellees, received for information of the Court. (3 cc) Not filed
11-27-73	Affidavit of service of above, rec'd. Unless Court directs
12- 4-73	Letter dated November 30, 1973 from counsel for appellees for the information of the Court.
1-11-74	Order (Seitz, Chief Judge and Staley, Van Dusen, Aldisert, *Adams,* Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) directing that the Clerk of this Court list this case for rehearing en banc at the convenience of the Court, filed.
1-11-74	Uncertified record in D.C. Civil No. 607-73 returned to Clerk of District Court with request that it be certified and returned to this office
1-15-74	Record and exhibits filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
1-16-74	Letter brief dated January 14, 1974 rec'd from David S. Baime, Esquire for the information of the Court.
1-18-74	Appearance of David S. Baime, Esquire in lieu of Edward Laire, counsel for appellee, filed.
1-18-74	Letter brief of appellant dated January 18, 1974 rec'd from Marvin D. Perskie, Esq. for the information of the Court.
2- 7-74	Order (*Seitz,* Staley, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth) denying appellant's motion to expunge supplemental brief of appellees and deferring appellees' motion to strike affidavit of Samuel Moore annexed to appellant's supplemental brief until the appeal is considered by the Court, filed.
2- 7-74	Brief and appendix for appellant in response to the Court's request, filed. (11 copies Affidavit of Service above, filed.
2- 9-74	Supplemental brief for appellees, rec'd February 12, 1974, filed and appendix rec'd for the information of the Court. (11 copies) service attached.
2-13-74	Reply brief for appellant, rec'd February 13, 1974. (11 copies) (for the information of Court —not filed unless Court directs).
3- 4-74	Letter dated March 1, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
3-11-74	Letter dated March 8, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
3-18-74	Letter dated March 14, 1974 rec'd from Marvin D. Perskie, Esquire for the information of the Court.
3-19-74	Order dated February 13, 1974 (Seitz, Chief Judge) directing 30 mins. argument for each side, filed.
3-26-74	Letter dated March 25, 1974 enclosing copy of opinion of U.S. Supreme Court in case of Steffel v. Thompson, No. 73-5581, appearing in Vol. 14, No. 23, Sec. 3 designated 14 CrL 3123, Crim. Law Reporter Mar. 20, 1974, rec'd from Marvin D. Perskie, Esquire for the information of the Court.
4-10-74	Reargued en banc Coram: Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, C.J.
4-12-74	Letter dated April 11, 1974, together with enclosures, received from Marvin D. Perskie, Esquire for the information of the Court.
5- 6-74	Letter dated May 3, 1974, rec'd from Marvin D. Perskie, Esq., for the information of the Court.
5-30-74	Letter dated May 29, 1974, rec'd from Marvin D. Perskie, Esq., for the information of the Court. (11 cc.)

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
5-31-74	Letter dated May 25, 1974, together with enclosure, rec'd from Marvin D. Perskie, Esq., rec'd for the information of the Court. (10 cc.)
6- 4-74	Letter dated June 3, 1974, together with enclosure, rec'd from David S. Baime, Esq., rec'd for the information of the Court. (10 cc.)
6- 8-74	Letter dated June 6, 1974, rec'd from Marvin D. Perskie, Esq., recd'd for the information of the Court.
7- 8-74	Opinion of the Court (Seitz, Chief Judge, and Van Dusen, *Aldisert,* Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) with separate dissenting opinion by Judge Adams, filed.
7- 8-74	Judgment on Rehearing reversing the order of the District Court, filed May 9, 1973, which dismissed the complaint; vacating the order entered May 9, 1973 denying the motion for a preliminary injunction; and remanding the cause to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceedings in the district court unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions; directing that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this Court, filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
7- 8-74	Order (Clerk) directing that the certified judgment in lieu of formal mandate issue forthwith in accordance with the opinion of this Court, filed.
7- 8-74	Recalled 7/23/74.
7- 8-74	Certified copy of order directing immediate issuance of the mandate sent to Clerk of District Court.
7- 8-74	Record and exhibits returned to Clerk of District Court.
7-10-74	Receipt for record and exhibits from Clerk of District Court, filed.
7-12-74	Motion by appellees to recall judgment in lieu of formal mandate, filed. Affidavit of service attached.
7-12-74	Verified Affidavit in Support of Motion to Recall, etc., filed. (10 copies).
7-12-24	Brief in Support of Motion, to Recall, etc. filed.

Docket Entries, United States Court of Appeals for the Third Circuit

Date	*Filings—Proceedings*
7-18-74	Brief in Opposition to Motion to Recall Judgment, etc. and Stay the Effect Thereof, filed. (10 copies) Certificate of service attached.
7-23-74	Order (CLERK) (Seitz, Chief Judge and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, Circuit Judges) recalling the certified judgment issued in lieu of formal mandate on July 8, 1974, and staying the issuance of the judgment in lieu of formal mandate until August 7, 1974, filed.
8- 6-74	Certified copy of partial proceedings in this Court for filing with petition for writ of certiorari forwarded to Clerk of Supreme Court.
8- 9-74	Certificate of docketing of petition for writ of certiorari on August 6, 1974, from Clerk of Supreme Court, filed. (S.C. No. 74-80).
8-10-74	Notice of filing on August 6, 1974, of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 74-80).
9-19-74	Notice of filing of petition for writ of certiorari on September 13, 1974 received from the Clerk of the Supreme Court, filed (S.C. No. 74-277).
9-20-74	Certified copy of all proceedings not included in certification of August 6, 1974 prepared and forwarded to the Clerk of the Supreme Court pursuant to the request of counsel for appellant.

Docket Entries, United States District Court for the District of New Jersey

GENERAL DOCKET

CIVIL 607-73

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

Basis of Action: Civil Rights Act—to Injoin & Restrain Prosecution

Date	*Filings—Proceedings*
5- 3-73	Complaint, filed
5- 3-73	Summons issued
5- 3-73	Order to show cause why temporary injunction should not issue, returnable May 9, 1973, filed (Cohen)
5- 3-73	Notice of Allocation and Assignment, filed

Docket Entries, United States District Court
for the District of New Jersey

Date	*Filings—Proceedings*
5- 8-73	Notice of motion by defendants for an order dismissing complaint, filed
5- 9-73	Hearing on return of Order to show cause why temporary injunction should not issue
	Oral Findings of Fact and Conclusions of Law; Ordered Petition for temporary injunction DENIED;
	Ordered motion by defts to dismiss action for lack of jurisdiction DENIED;
	Ordered motion by defts to dismiss action for failure to state a claim GRANTED—Order to be submitted (Kitchen)
5- 9-73	Transcript of Oral Opinion, filed
5- 9-73	Order denying Defendants motion to dismiss for lack of Jurisdiction; Granting Defendants motion to dismiss for failure to state a claim; and Denying a stay pending appeal, all without costs, filed (Kitchen) Notices mailed
5-10-73	Transcript of Hearing, filed
5-11-73	Notice of Appeal, filed
5-14-73	Record on Appeal, mailed Clerk, U.S. Court of Appeals (Notice furnished all Counsel)
5-18-73	Certified copy of Order of U.S.C.A. denying Appellant's Motion for Injunction pending appeal, etc., filed
9-10-73	Certified copy of Order of U.S.C.A. staying State Criminal Action, filed

Docket Entries, United States District Court
for the District of New Jersey

Date	*Filings—Proceedings*
9-11-73	Certified copy of Judgment of U.S. Court of Appeals Reversing District Court together with copy of Opinion, filed
9-17-73	Summons returned, served on May 14, 1973, filed
9-17-73	Petition for Writ of Habeas Corpus ad Testificandum, filed
9-17-73	Writ of Habeas Corpus issued (Cohen, C. J.)
9-24-73	Certified copy of Order of U.S.C.A. recalling Mandate pending the filing by Appellees of a Petition for rehearing en banc, filed
11- 1-73	Certified copy of Order of U.S. Court of Appeals denying Petition for Rehearing en banc, etc., filed

Indictment

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL

STATE GRAND JURY NUMBER SGJ 10-72-10

DOCKET NUMBER .....

INDICTMENT

STATE OF NEW JERSEY

v.

EDWIN H. HELFANT, SAMUEL MOORE

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; knowingly, willfully and corruptly did conspire, confederate and agree together, with each other, and with John Cantoni, Shelly Kravitz, John Anderson, Harold Garber, Richard Cantoni, also known as Babe, Dominick Perri

and William H. Hicks who are named as co-conspirators but not as defendants herein, to commit acts for the perversion and obstruction of justice and due administration of the laws; the said Edwin H. Helfant and the said Samuel Moore then and there knowing that a criminal complaint in the case of State v. John Cantone, Docket No. C-251 for 1968, was pending in the Municipal Court of the City of Egg Harbor City aforesaid, the said matter involving a charge that John Cantoni did commit atrocious assault and battery upon William H. Hicks and Eugene Summerson on March 17, 1968; and the said Samuel Moore then and there being the Municipal Court Judge in the City of Egg Harbor City; that is, knowingly, willfully and corruptly to use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court of Egg Harbor City, favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, thereby interfering with the goals and aims of the judicial process and denying the public the benefits and protections of the criminal laws of the State of New Jersey, to the obstruction, hinderance and impedance of the due course of public justice.

It was a part of the said conspiracy that William H. Hicks would withdraw the aforesaid complaint, drop the charge of atrocious assault and battery and not continue the criminal prosecution.

It was further a part of the said conspiracy that the said Samuel Moore would violate the duties of his judicial office which he was sworn and required by law to uphold, including the duties imposed by N.J.S.A. 2A:8-23, R.R. 8:4-10 of Court Rules, and the Municipal Court

Indictment

Manual, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by willfully misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint.

The Grand Jurors aforesaid, upon their oaths, do further present that in execution of the said conspiracy and to effect the objects thereof, the following overt acts were committed:

OVERT ACTS

1. On or about March 17, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did communicate by telephone with Shelly Kravitz and then and there Edwin H. Helfant did tell Shelly Kravitz that he wanted to meet him the following day and discuss the assault by John Cantoni upon William H. Hicks which had occurred earlier that morning.

2. On or about March 18, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City in the County of Atlantic, and then and there Edwin H. Helfant did say that if John Cantoni paid the sum of $5,000 he would see to it that no charges were pressed.

3. On or about March 18, 1968, Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, did communicate with John Cantoni and did relate to him a conversation he had with Edwin H. Helfant.

Indictment

4. On or about March 19, 1968, Edwin H. Helfant did meet with Shelly Kravitz, at the City of Atlantic City, in the County of Atlantic, and then and there Edwin H. Helfant stated that if John Cantoni paid the sum of $3,000 charges would not be pressed for the assault by John Cantoni against William H. Hicks, but if the money were not paid he would personally prosecute the case before Judge Moore in Egg Harbor City.

5. On or about March 19, 1968, at the City of Atlantic City, in the County of Atlantic, Shelly Kravitz did meet with John Cantoni and did relate to him the conversation he had with Edwin H. Helfant earlier that day.

6. Between on or about March 29, 1968, and on or about April 21, 1968, at the City of Somers Point, in the County of Atlantic, Richard Cantoni, also known as Babe, did meet with Edwin H. Helfant and did discuss the payment of a sum of money by John Cantoni to Edwin H. Helfant in return for the withdrawal of the complaint filed against John Cantoni by William H. Hicks.

7. Between on or about April 21, 1968, and on or about June 5, 1968, John Cantoni did meet with Harold Garber at the Algiers Lounge at the City of Atlantic City, in the County of Atlantic, and then and there they did discuss the paying of money to Edwin H. Helfant by John Cantoni for the withdrawal of the complaint filed by William H. Hicks against John Cantoni.

8. At the end of May or the beginning of June, 1968, at the City of Atlantic City, in the County of Atlantic, John Cantoni did give $1,700 to John Anderson.

Indictment

9. On or about June 7, 1968, at the City of Somers Point, in the County of Atlantic, William H. Hicks did recieve a sum of money in the amount of $1,500 from Edwin H. Helfant.

10. Between on or about June 7, 1968, and on or about July 20, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel Moore did direct Alolph Joseph to write the words "We do hereby withdraw the within complaint against John Contoni" on the back of the complaint filed against John Cantoni by William H. Hicks, in the case of State v. John Cantone, Docket No. C-251 for 1968, and Samuel Moore did then take the complaint from the Municipal Court of Egg Harbor City.

11. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, William H. Hicks did sign his name on the back of the complaint he filed against John Cantoni charging Cantoni with atrocious assault and battery, in the case of State v. John Cantone, Docket No. C-251 for 1968, under the printing: "We do hereby withdraw the within complaint against John Cantone" and above the typing "William H. Hicks".

12. On or about July 20, 1968, at the City of Atlantic City, in the County of Atlantic, Edwin H. Helfant did sign his name on the back of the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, over the typing "Witness as to Eugene Summerson".

13. On or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, Samuel

Indictment

Moore did return the complaint filed by William H. Hicks and Eugene Summerson against John Cantoni, in the case of State v. John Cantone, Docket No. C-251 for 1968, to Adolph Joseph, did show him the signature and typing on the back of the complaint and did tell Adolph Joseph that permission had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and that the signature over the typed lines "Witness as to William H. Hicks" and "Witness as to Eugene Summerson" were those of people from the Atlantic County Prosecutor's Office.

All in violation of N.J.S. 2A:98-1 and N.J.S. 2A:98-2, and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant and Samuel Moore between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court; the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City; and the said Edwin H. Helfant and Samuel Moore then and there knowing that a matter was pending in the Municipal Court for the City of Egg Harbor City, the said matter involving a criminal complaint which was filed by William H. Hicks and Eugene Summerson against John Cantoni charging atrocious assault and battery, in

the case of State v. John Cantone, Docket No. C-251 for 1968; and the said Edwin H. Helfant and Samuel Moore contriving and intending to obstruct, hinder and impede the due course of public justice and the due administration of laws in the said matter; willfully, knowingly and corruptly did use the power and influence of the public office of the said Samuel Moore to obtain action in the Municipal Court for the City of Egg Harbor City favorable to the defendant, John Cantoni, and against the interests of the State of New Jersey in the said matter, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of the aforesaid complaint without notifying the Atlantic County Prosecutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard on the matter; and by intentionally misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; to the obstruction, hinderance and impedance of the due course of public justice; all in violation of the provisions of N.J.S. 2A:85-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT III

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant between on or about March 17, 1968, and on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic; at the City of Atlantic City, in the County of Atlantic; at the City of Somers Point, in the County of Atlantic, and elsewhere, and within the jurisdiction of

this Court, the said Edwin H. Helfant then and there knowing that a criminal complaint was pending in the Municipal Court of Egg Harbor City aforesaid, in the case of State v. John Cantone, Docket No. C-251 for 1968, the criminal complaint charging that John Cantoni did commit atrocious assault and battery upon the said William H. Hicks and Eugene Summerson at the City of Egg Harbor City, on March 17, 1968, in violation of N.J.S. 2A:90-1, the said allegation that John Cantoni committed atrocious assault and battery upon William H. Hicks and Eugene Summerson being a true, accurate and valid charge of an offense indictable at law in New Jersey, did willfully and knowingly aid, abet, counsel, command, induce, procure, and cause William H. Hicks to accept, take, and receive a sum of money to compound an indictable offense under the laws of the State of New Jersey, that is, for William H. Hicks to withdraw the aforesaid complaint, to drop the charges and not to continue the criminal prosecution for the said indictable offense in return for the receipt by him of a sum of money, in violation of N.J.S. 2A:97-1 and N.J.S. 2A:85-14, and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on or about September 10, 1968, at the City of Egg Harbor City, in the County of Atlantic, and elsewhere, and within the jurisdiction of this Court, the said Samuel Moore then and there being a public officer, that is, Judge of the Municipal Court for the City of Egg Harbor City, aforesaid, and the said Samuel Moore then and there having

by reason of such public office the duties, among others, to display good faith, honesty and integrity and to be impervious to corrupting influences, and to enforce the laws of the State of New Jersey to the best of his ability, uninfluenced by motives adverse to the best interests of the City of Egg Harbor City, the County of Atlantic, and the State of New Jersey, to transact the business of his said public office frankly and openly in the light of public scrutiny so that the public may know and be able to judge him and his work fairly; to abide by the commands in the Canons of Judicial Ethics to promote justice, to conduct himself above reproach, to administer justice according to law and not to allow other affairs or private interests to interfere with the prompt and proper performance of his judicial duties; and to abide by N.J.S. 2A:8-23, and the 1968 New Jersey Court Rules, R.R. 8:4-10, and the Municipal Court Manual requiring that a complaint pending in a municipal court wherein an offense indictable at law is charged not be discharged and dismissed without giving the County Prosecutor prior notice and an opportunity to be heard; did knowingly, willfully, and corruptly engage in misconduct in his said public office; that is, the said Samuel Moore did breach and violate the aforesaid duties by using the power and influence of his said public office to obtain action in the Municipal Court of the City of Egg Harbor City favorable to John Cantoni and against the interests of the State of New Jersey, the County of Atlantic and the City of Egg Harbor City, by knowingly, willfully and corruptly authorizing, securing and bringing about the dismissal of a complaint charging atrocious assault and battery, a high misdemeanor and an indictable offense, in the case of State v. John Cantone, Docket No. C-251 for 1968, without notifying the Atlantic County Prose-

cutor of the dismissal and without furnishing the Atlantic County Prosecutor with an opportunity to be heard; and by misrepresenting to the Municipal Court Clerk for the City of Egg Harbor City that approval had been granted by the Atlantic County Prosecutor's Office for the dismissal of the aforesaid complaint; in violation of N.J.S. 2A:85-1, and against the peace of this State, the government and dignity of the same.

COUNT V

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Samuel Moore on October 25, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing in the manner and form following to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-17) and obstruction of justice (N.J.S. 2A:85-1), and which investigation the Grand Jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Samuel Moore was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the foreman thereof, the said Samuel Moore then and there taking the oath

that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and then having competent authority to administer such oath to the said Samuel Moore in that behalf.

3. Upon the said Samuel Moore being sworn, it was then and there inquired about the knowledge of the said Samuel Moore about a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, and the manner in which the aforesaid complaint was dismissed without the approval or the knowledge of the Atlantic County Prosecutor's Office.

4. In reference to the aforementioned matter under inquiry the said Samuel Moore then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in effect that in 1968 he had no knowledge of and did not participate in the disposition of the aforesaid complaint, that is, that he never saw the aforesaid complaint, that he never directed Adolph Joseph to make any writing on the back of the complaint, that he never took the complaint from the Municipal Court of the City of Egg Harbor City, that he never told Adolph Joseph that approval had been given by the Atlantic County Prosecutor's Office to dismiss the complaint and that he never authorized the dismissal of the aforesaid complaint as follows:

> Q. Did you in June of 1968 instruct Ady Joseph to write, "We do hereby withdraw the within complaint against John Cantoni"?
>
> A. Oh, no, impossible.
>
> Q. You are absolutely certain?

A. Absolutely impossible. I couldn't possibly do such a thing.

Q. You never saw this complaint before—

A. August of this year.

Q. You never instructed Mr. Joseph to print, "We do hereby withdraw the within complaint against John Cantoni"?

A. No, sir.

Q. Did you after instructing Mr. Joseph to do that printing, follow the complaint up?

A. What was that?

Q. I said, did you, after having instructed Mr. Joseph to print it—

A. I didn't do such a thing.

Q. Did you—okay, strike that, excuse me.

Did you ever, after showing the complaint to Mr. Joseph follow the complaint up?

A. I didn't see the complaint until August of this year. I just testified that I did not see these papers until August of this year. So I couldn't possibly have talked to Mr. Joseph or directed him to do anything as far as these papers are concerned.

Q. Judge, I'm going to ask the questions and you, if you didn't do it, you could say you did not do it.

A. Yes, sir.

Q. Did you ever follow that complaint up and tell Mr. Joseph you were going to take it to the Atlantic County Prosecutor's Office to have them authorize the withdrawal of that complaint?

A. No, sir.

Q. Did there ever come a time, Judge Moore, that in July of 1968 Mr. Joseph asked you what happened to the complaint, that in June you told him you were going to take it to the prosecutor's office,

and you told him you forgot about it, but that you will get the authorization from the prosecutor's office?

A. That's a deliberate lie if that were said.

Q. Judge Moore, did there ever come a time in September of 1968 where you brought that complaint back and told Mr. Joseph that the complaint had been withdrawn by Hicks and Summerson and that those were their signatures?

Excuse me, on the right-hand side, William Hicks and Eugene Summerson and the signature witness as to Hicks and the witness as to Summerson was the authorization from the Atlantic County Prosecutor's Office to withdraw the

A. Anybody who made that statement, it's a deliberate lie. I'm one of the few people, and probably the only one who can recognize Helfant's signature. That's his signature there.

If I had anything to do with the complaint and these signatures, I certainly wouldn't stand for Helfant, a municipal judge, signing as a witness for dismissing an indictable offense, which would be improper. I can't understand Helfant's doing such a thing. That's stupidity.

Q. Judge, again, just to get your—what appears to be your denial on the record—did you tell Mr. Joseph that you received authorization from the Atlantic County Prosecutor's Office to withdraw the complaint and that the signatures on the left-hand side of the complaint, witness as to Willliam H. Hicks, witness as to Eugene Summerson dated July 20, 1968 were the signatures of the prosecutor's office authorizing the withdrawal of the complaint?

A. No.

Q. No, sir, you do not?

A. No, sir.

Q. Now, do you recognize any of the signatures on this complaint?

A. The only signature I recognize is Helfant. I don't know Hick's signature, Summerson's signature. I never saw Hicks in my life until about five weeks ago. I don't know who this man is, Parri. I don't even know what the name is. I never saw that before.

Q. And whose signature is it over the line, "Witness as to Eugene Summerson"?

A. That's Edward Helfant.

Q. Have you seen Helfant's signature before?

A. Oh, yes, I had a copy of it. I went to the bank about a month ago, they had just cashed a check of his. I had a photocopy made of it. It disappeared somehow or other, but that's his signature.

Q. Judge, is there any doubt in your mind that that's Mr. Helfant's signature?

A. No doubt at all.

Q. Again, Judge, for the record, this complaint says, "Returned 9/10/68." Do you recognize the printing, "Returned"?

A. No, sir.

Mr. Joseph told me he wrote that.

Q. Is that your printing?

A. No, sir.

Q. Did you give the complaint back to Mr. Joseph on 9/10/68 and tell him to enter a dismissal on the docket?

A. No, sir; no, sir.

Q. Judge, would the fact that Mr. Joseph testified under oath before this grand jury, that in June

of '68 you authorized him to write on Exhibit 1, "We do hereby withdraw the within complaint against John Cantoni", that subsequently you said you were taking it to the prosecutor's office, that subsequently he asked you in July what happened to the complaint and you told him you had forgotten about it, you were going to get authorization, and that on September 10, 1968 you returned the complaint to him and told him that the signatures on the left-hand side were from the Atlantic County Prosecutor's Office that authorization had been granted to dismiss the complaint and that he was to enter a dismissal on the docket.

Would that testimony or my representation that that was Mr. Joseph's testimony on the record, refresh your recollection as to any of the events you testified about?

A. That's a deliberate lie.

Q. Does that representation as to Joseph's testimony refresh your recollection?

A. I can't—no, no recollection, no refreshing necessary. That is a lie because I never saw these papers until August of 1972.

Q. So, in other words, in spite of what Mr. Joseph had indicated and in spite of what you told us about Mr. Joseph being a good clerk and truthful man as far as you knew, it's now your contention he perjured himself before the grand jury?

A. He certainly did;

whereas in truth and in fact the said Samuel Moore in 1968 did have knowledge of and did participate in the disposition of the aforesaid complaint, that is, the said Samuel Moore knew of the existence of the aforesaid com-

plaint in 1968, did direct Adolph Joseph to make certain writings on the back of the complaint, did in fact take the complaint from the Municipal Court for the City of Egg Harbor City, did tell Adolph Joseph that approval had been granted by the Atlantic County Prosecutor's Office to dismiss the complaint and did authorize the dismissal; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VI

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. On the day aforesaid, in the City and County aforesaid, a criminal investigation was pending before the State Grand Jury, which investigation concerned the activities of Edwin H. Helfant and Samuel Moore and divers other persons associated with them in connection with the crimes of conspiracy (N.J.S. 2A:98-1 and 2), compounding a crime (N.J.S. 2A:97-1), misconduct in office (N.J.S. 2A:85-1), and which investigation the grand jury then and there had lawful power and authority to conduct.

2. In the course of said investigation the aforesaid Edwin H. Helfant was called before the State Grand Jury and then and there was duly and regularly sworn as a witness before the State Grand Jury by the fore-

man thereof, the said Edwin H. Helfant then and there taking the oath that the evidence which he should give to the State Grand Jury should be the truth, the whole truth and nothing but the truth, and the foreman then and there having competent authority to administer such oath to the said Edwin H. Helfant in that behalf.

3. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into how and under what circumstances a signature purporting to be that of William H. Hicks was placed upon a certain release, dated June 7, 1968, which discharged John Cantoni from any claim, or claims, or causes of action emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey, in 1968.

4. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, that the aforementioned release was signed in his presence on June 7, 1968 by William H. Hicks, as follows:

Q. I show you State Grand Jury Exhibit No. 11.
A. Yes, sir.
Q. Do you recognize that document?
A. Yes, sir.
Q. And what is that document?
A. It's a release that I prepared.
Q. Did you dictate it?
A. I don't know if I dictated it or I told Jane to prepare a release and gave her the terms.

Q. Well, most of it is kind of formal?
A. Yes, it's a formal release.
Q. "And more particularly from any claim or claims or causes of action whatsoever, emanating from a disagreement or altercation that took place at the Harbor House Bar, Egg Harbor City, New Jersey on the day of , 1968."
Did you dictate that language?
A. Could be, or else Jane put it in there on her own. I mean, she knows how to prepare a release.
Q. She would have access to this information?
A. I would have given her the date and told her what, and she would have just prepared it.
Q. And did Hicks sign this release in your presence?
A. In my presence and in the prsence of Jane Durham (D-u-r-h-a-m).
Q. And this is the 7th day of June?
A. Whatever date is on that instrument is the date it was signed.
Q. Well, see, if the 7th day of June—
A. 7th day of June. And that's filled in by Jane.
Q. So this must have taken place at your office?
A. Yes;

whereas in truth and in fact, the said Edwin H. Helfant then and there well knew that the release was not signed in his presence on June 7, 1968, by William H. Hicks and the signature on the release which he was shown in the grand jury was a forgery; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

Indictment

COUNT VII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired whether he had affixed his signature to the back of a criminal complaint, in the case of State v. John Cantone, Docket No. C-251 for 1968, over a type line reading: "Witness as to Eugene Summerson".

3. In reference to the aforementioned matter under inquiry the said Eugene H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that the signature he was being questioned about was not his, as follows:

Q. I show you a signature under which is typed "Witnessed as to Eugene Summerson", and I ask you if you recognize that signature?
A. I do not, sir.
Q. Mr. Helfant, is that your signature?
A. No. This is not my signature.
Q. Are you absolutely certain of that?

Indictment

A. One hundred percent certain. On my life, that's not my signature;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that the signature on the back of the aforesaid criminal complaint over the typing "Witness as to Eugene Summerson" was his signature; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT VIII

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into if he ever had a discussion in 1968 with Richard Cantoni, also known as Babe, at the Green Lantern Motel about dropping the criminal charges against John Cantoni in return for the payment of a sum of money.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally, and knowing the same to be false, said, deposed, swore and

gave in evidence testimony in the effect that he never met Richard Cantoni, also known as Babe, and never had any discussion with him about the criminal charges pending against John Cantoni, as follows:

> Q. Any discussion with Babe Cantoni about this case?
>
> A. Do not know Babe Cantoni.
>
> Q. Any discussion with a man who came to you at the Green Lantern?
>
> A. Nobody ever came to me at the Green Lantern.
>
> Q. If I were to tell you that Babe Cantoni has indicated that he came to you and discussed with you how much you wanted to drop the charges and you said $5,000.00 or Cantoni will go to jail, does that refresh your recollection?
>
> A. That would have been an untrue statement because it never happened.
>
> Q. Never happened?
>
> A. Never happened.
>
> Q. Never saw Babe Cantoni?
>
> A. Don't know Babe Cantoni.
>
> Q. Just know his name?
>
> A. Only from what Mr. Lipman told me, that he represented the vending machine company and that this is how he got into the case, that's the only time I heard the name Babe Cantoni.
>
> Q. You are absolutely certain that Babe Cantoni never came to you and asked you how much money you wanted to drop the charges?
>
> A. Absolutely certain;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he had met with Richard

Cantoni, also known as Babe, at the Green Lantern Motel in 1968 and had discussed with him the dropping of criminal charges against John Cantoni for atrocious assault and battery in return for the payment by John Cantoni of a sum of money to Edwin H. Helfant; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

COUNT IX

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that Edwin H. Helfant on November 8, 1972, at the City of Trenton, in the County of Mercer, and within the jurisdiction of this Court, did commit willful false swearing, in the manner and form following, to wit:

1. Paragraphs (1) and (2) of Count VI of this indictment are realleged herein as if set forth in full.

2. Upon the said Edwin H. Helfant being sworn, it was then and there inquired into whether Edwin H. Helfant ever met with Shelly Kravitz and discussed with him the dropping of criminal charges against John Cantoni in return for the payment of money to Edwin H. Helfant.

3. In reference to the aforementioned matter under inquiry, the said Edwin H. Helfant then and there before the State Grand Jury falsely, willfully, intentionally and knowing the same to be false, said, deposed, swore and gave in evidence testimony, in the effect that he never met with Shelly Kravitz and had discussions with him about the criminal case involving John Cantoni, as follows:

Q. Do you know a man by the name of Shelly Kravitz?

A. Yes, sir.

Q. How long have you known Kravitz?

A. I would say about seven or eight years.

Q. Did you ever have any discussion with Shelly Kravitz about this case?

A. Absolutely not.

Q. A day or two after that beating or this injury to Mr. Hicks, did you call Mr. Kravitz and tell him you wanted to see him in your office?

A. Absolutely not.

Q. When Kravitz first came to see you in your office, did you tell Kravitz that Cantoni had to get some money up or you would go to quote "Personally prosecute the case"?

A. Kravitz never came to my office. And I never discussed this case with him.

Q. Did you ever tell Shelly Kravitz or anybody else you were going to "personally prosecute this case", before Judge Moore, unless Cantoni came up with the money?

A. Not alone didn't I say that, it wouldn't be possible.

Q. I don't particularly care whether or not that was possible. Did you or did you not say that?

A. I never said any such thing, never discussed this case with Shelly Kravitz at all.

Q. Did you tell Shelly Kravitz in a subsequent conversation, unless Cantoni came up with the money you were going to see he was going to be put in jail?

A. I never said any such thing.

Q. That would have been extortion?

A. I don't know about extortion, it would have been an improper statement.

Q. It would be compounding a felony, wouldn't it?

A. Most likely;

whereas in truth and in fact the said Edwin H. Helfant then and there well knew that he did meet in 1968 with Shelly Kravitz and had discussions with him about the dropping of criminal charges against John Cantoni for atrocious assault and battery against William H. Hicks in return for the payment of a sum of money; contrary to the provisions of N.J.S. 2A:131-4, and against the peace of this State, the government and dignity of the same.

EVAN WILLIAM JAHOS,
Assistant Attorney General and
Director of the Division of
Criminal Justice

A TRUE BILL:

CARL F. PENNIPEDE,
Foreman

Notice of Motion to Dismiss Indictment

(Filed—March 8, 1973)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL
MERCER COUNTY

INDICTMENT No. SGJ 10-72-10
Criminal Action

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT, SAMUEL MOORE,

Defendants.

To: JOSEPH A. HAYDEN, JR., Deputy Attorney General
Organized Crime and Special Prosecutions Division
New Jersey Police Headquarters
Box 68
West Trenton, N. J. 08625

THE HONORABLE ARTHUR A. SALVATORE
Mercer County Court House
Trenton, N. J. 08625

PLEASE TAKE NOTICE that the undersigned attorney for the defendant will make application before the Superior Court of New Jersey, Law Division (Criminal), Mercer

Notice of Motion to Dismiss Indictment

County, at the Court House in Mercer County on Friday, March 16, 1973 at 9:00 a.m. in the forenoon or as soon thereafter as the matter can be heard for Orders from the Court as follows:

1. Dismissing all counts of the indictment because of the misconduct of the Grand Jury and/or the Deputy Attorney General in the presentation of evidence to the Grand Jury and in the return of the within indictment, including the involvement of the Deputy Attorney General with the Supreme Court and in releasing information to the Supreme Court concerning the defendant, which matters emanated from the investigation being carried out by the Grand Jury and the Deputy Attorney General.

2. Dismissing Counts 1, 2 and 3 of the indictment because of the fact that there has been no compounding of a crime since at the time of the alleged compounding, the basic offense was viable and indictable.

3. To dismiss Counts 6, 7, 8 and 9 of false swearing because of the improper conduct of the Deputy Attorney General in not fully advising the jurors of the criminal records of State's witnesses whose credibility was directly involved, and of withholding this information from the Grand Jury, and because of the improper actions of the Deputy Attorney General in presenting contradictory statements to the Grand Jury and not explaining their contradiction to the Grand Jurors and because of the additional reasons stated and to be discovered as pointed out in Point I and hereafter.

4. At the same time and place the defendants will seek to obtain an Order establishing their right at a specified

time and place to depose the Deputy Attorney General, Joseph A. Hayden, Jr., in this matter in order that proper appellate review might be made to ascertain just what documents and information was supplied by Joseph A. Hayden, Jr. to the Justices of the Supreme Court or any one of them prior to the conference of Edwin Helfant with the Justices on November 8, 1972 and what information Deputy Attorney General Joseph A. Haydlen, Jr. received from the Supreme Court in connection with Edwin Helfant both before and after the conference.

5. At the same time and place the defendant will seek to depose Joseph A. Hayden, Jr. in order to establish possible misconduct on his part in connection with the change of testimony before the Grand Jury supplied by Eugene Summerson, Shelley Kravitz and Willliam Hicks before the Grand Jury herein.

6. Defendants will seek to renew their mottion to dismiss the indictment based on violation of the defendants' constitutional rights under the 4th, 5th and 6th Amendments after these depositions.

7. At the same time and place application will be made to renew the request for separate trials of the defendants Edwin H. Helfant and Samuel Moore on the basis that representations made by the Deputy Attorney General to the Court at the previous motion, as borne out by the transcript of the Grand Jury proceedings which were subsequently received, to the end that there was only minor conflict in their positions, was absolutely untrrue.

8. To dismiss Count 3 of the Indictment charging aiding and abetting the compounding of a crime because the principal offense was not committed.

9. At the same time and place, motion will be made to dismiss all counts of the indictment because the Supreme Court has been acquainted with the factual matters involved in the Grand Jury investigation during its pendency, either directly or indirectly by the Deputy Attorney General conducting the investigation.

Thus, irreparable taint and fatal prejudice have been visited upon the entire proceedings and all counts of the indictment involved.

10. Please take notice that at the same time and place defendant Helfant will apply to the Court for an Order directing the Deputy Attorney General Joseph A. Hayden, Jr. to submit to a lie detector test conducted by a qualified and independent lie detector operator at a time and place and under conditions to be fixed by the Court, to ascertain the truth of the testimony to be sought in connection with all confrontations of the Deputy Attorney General with the Supreme Court or any member thereof in connection with the investigation involving the defendant Edwin H. Helfant.

11. At the same time and place, application will be made to take the deposition of the foreman of the Grand Jury in order to further substantiate the claims of misconduct made herein, at a time and place and under conditions to be fixed by the Court.

12. At the same time and place application will be made to dismiss all counts of the indictment and to renew the motion heretofore made for change of venue based on the attached newspaper reports of December 7, 1972 which appeared all over the State of New Jersey and because

Notice of Motion to Dismiss Indictment

of the statements made in the attached transcript which were made in open Court.

Attached to this Notice of Motion and incorporated herein by this reference thereto are applicable exhibits.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE,
Co-Counsel for defendant Helfant
By: Marvin D. Perskie

DATED: March 8, 1973

Order of Judge Salvatore Denying Motion to Dismiss the Indictment

(Filed—April 6, 1973)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MERCER COUNTY

INDICTMENT No. SGJ 10-72-10

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT, SAMUEL MOORE,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., Esquires, attorneys for the defendant Edwin H. Helfant on motion to dismiss the indictments, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General;

It is in the case of the motion dated March 8, 1973, on this 5th day of April, 1973 ORDERED AND ADJUDGED as follows:

1. Paragraphs 1, 2, 3, 4, and 5 are herewith denied.
2. Action on Paragraph 6 is denied.

Order of Judge Salvatore Denying Motion to Dismiss the Indictment

3. Paragraph 7 is denied, with reservation to renew.

4. Paragraph 8 is withheld pending further proceedings.

5. Paragraph 9 is denied.

6. Paragraphs 10, 11 and 12 are denied.

IT IS FURTHER ORDERED AND ADJUDGED that the action of the Court on the application to amend the previous motion to dismiss the indictments dated March 15, 1973 is withheld, pending further Court proceedings.

ARTHUR A. SALVATORE
J.S.C.

I consent to the form of the above Order

Edward C. Laird,
Deputy Attorney General

Notice of Motion for Leave to Appeal in Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.

THE STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT,

Defendant-Appellant

To: THE HONORABLE JUDGES OF THE APPELLATE DIVISION
Mercer County Court House
Trenton, N. J. 08607

EDWARD C. LAIRD, DEPUTY ATTORNEY GENERAL
Organized Crime & Special Prosecutions Section
New Jersey State Police Headquarters
Box 68
West Trenton, N.J. 08625

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant Edwin H. Helfant move the Superior Court of New Jersey, Appellate Division, to grant the defendant application for leave to appeal to the Appellate Division in accordance with the provisions of R. 2:2-4, from

Notice of Motion for Leave to Appeal in Appellate Division

an interlocutory order entered by Judge Arthur Salvatore in the Superior Court of New Jersey, Mercer County, Criminal Law Division, dated April 5, 1973 denying inter alia, Motion of March 8, 1973 to dismiss counts of the indictment because of the misconduct of the Grand Jury and/or the Deputy Attorney General in connection with this indictment and denying Motion to dismiss the indictment because of the involvement of the Supreme Court in connection with the factual matters under investigation before the State Grand Jury and denial of Motion to dismiss the indictment and renewing the Motion for change of venue because of prejudicial publicity and Order dismissing Motion for a severance of trials in the case of the defendant Moore and the defendant Helfant reserving right to raise these and other matters in the event of an appeal from Final Judgment.

MARVIN D. PERSKIE, ESQUIRE
PATRICK T. MCGAHN, JR., ESQ.
Co-Counsel for Defendant
By: Marvin D. Perskie, Attorney
for Defendant-Appellant

Orders of Appellate Division Denying Leave to Appeal

(Filed—May 4, 1973)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. AM-333-72

Motion No. M-1345-72

Before Part D

Judges Kolovsky
Matthews
Crahay

STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT

Moving Papers Filed—April 16, 1973

Answering Papers Filed—April 27, 1973

Date Submitted to Court—April 27, 1973

Date Decided—May 3, 1973

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Orders of Appellate Division Denying Leave to Appeal

Motion for Leave to Appeal—Denied.

For the Court:

s/ HAROLD KOLOVSKY
P.J.A.D.

Witness, the Honorable Harold Kolovsky, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 3rd day of May 1973.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

(Filed—May 17, 1973)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. AM-340-72

Motion No. M-1445-72

Before Part D

Judges Kolovsky
Matthews
Crahay

STATE OF NEW JERSEY

vs.

EDWIN H. HELFANT

Orders of Appellate Division Denying Leave to Appeal

Moving Papers Filed—April 23, 1973

Answering Papers Filed—May 1, 1973

Date Submitted to Court—May 14, 1973

Date Decided—May 16, 1973

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for Leave to Appeal—Denied.

For the Court:

s/ HAROLD KOLOVSKY
P.J.A.D.

Witness, the Honorable Harold Kolovsky, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 16th day of May 1973.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

Notice of Motion for Leave to Appeal and for Certification

SUPREME COURT OF NEW JERSEY

Re: New Jersey Superior Court
Appellate Division Numbers
AM-333-72 and AM-340-72

Criminal Action

STATE OF NEW JERSEY,

vs.

EDWIN H. HELFANT,

Defendant.

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey*

The Honorable Arthur Salvatore
Mercer County Court House
Trenton, N. J. 08607

Edward C. Laird, Deputy Attorney General
Organized Crime and Special Prosecutions Section
New Jersey State Police Headquarters, Box 68
West Trenton, New Jersey 08625

PLEASE TAKE NOTICE that the undersigned attorneys for the defendant, Edwin H. Helfant, herewith appeal to the Supreme Court of the State of New Jersey in accordance

Notice of Motion for Leave to Appeal and for Certification

with the provisions of R. 2:2-2(b) and (c) and R. 2:12-1 for Leave to Appeal Two Interlocutory Orders of the Trial Court presently before the Superior Court, Appellate Division on application for Leave to Appeal and further for certification of the Supreme Court to the Appellate Division of these Appeals presently pending in that Court and unheard as of this date. Attached hereto is Brief in support of this application which is an emergent matter and which involves substantial and imminent irreparable injury to the defendant.

MARVIN D. PERSKIE, ESQUIRE
PATRICK T. MCGAHN JR., ESQ.
Co-Counsel of Defendant
By: MARVIN D. PERSKIE
Attorney for Defendant

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-324 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Movant,

vs.

EDWIN H. HELFANT,

Defendant-Petitioner.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss petition for certification is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE

Acting Clerk

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-323 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDWIN H. HELFANT,

Defendant-Movant.

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE
Acting Clerk

Orders of New Jersey Supreme Court Demying Motion for Leave to Appeal and for Certificaation

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

C-416 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintifff-Respondent,

vs.

EDWIN H. HELFANT,

Defendaint-Petitioner.

To Appellate Division, Superior:

A petition for certification having been submitted to this Court, and the Court having considered tthe same,

It is hereupon Ordered that the petition for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, on the 2nd day of May, 1973.

FLORENCIE R. PESKOE

Acting Clerk

Orders of New Jersey Supreme Court Denying Motion for Leave to Appeal and for Certification

(Filed—May 2, 1973)

SUPREME COURT OF NEW JERSEY

M-325 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDWIN H. HELFANT,

Defendant-Movant.

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal and for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 2nd day of May, 1973.

FLORENCE R. PESKOE
Acting Clerk

Verified Complaint, dated May 2, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO.

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Defendants.

The plaintiff, Edwin H. Helfant, residing at Green Lantern Motel, Somers Point, Atlantic County, State of New Jersey, by way of complaint says:

1. Plaintiff is a citizen of the United States and resides in Atlantic County, New Jersey. All defendants herein are residents of the State of New Jersey.

2. Defendants, George F. Kugler, Attorney General of the State of New Jersey, Joseph A. Hayden, Jr., Deputy

Verified Complaint, dated May 2, 1973

Attorney General of the State of New Jersey, Chief Justice Joseph A. Weintraub, Associate Justices Nathan L. Jacobs, Haydn Proctor, Frederick W. Hall, Worrall F. Mountain, Jr., Mark A. Sullivan, of the Supreme Court of New Jersey and The State of New Jersey, deprived plaintiff of privileges and immunities guaranteed to every citizen of the United States, including plaintiff, by Amendment 5 and Section 1 of Amendment 14 of the Constitution of the United States, and by reason thereof, this Court has jurisdiction under 42 U.S.C.A., Section 1983 and 28 U.S.C.A. Section 1343.

3. The plaintiff herein, Edwin H. Helfant, is a member of the Bar of the State of New Jersey and a former municipal court judge.

4. Some time before October 18, 1972 the State of New Jersey began a State Grand Jury investigation, inter alia, into an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the defendant was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.

5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the U. S. Constitution and refused to testify. See attached exhibit.

6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 mintues before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amend-

ment. Chief Justice Weintraub and another Justice also asked of plaintiff some questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State

and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of Judgeship, but for his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation.

10. To date, the Deputy Attorney General has not indicated what was the purpose for his immediately visiting the Supreme Court chambers after the plaintiff had left there, but on being confronted with the facts in open court, has resorted to an illusory "right of privacy" and an alleged right of interdepartment privilege and communication which is not only non-existent but violative of the basic constitutional concept of separation of power. (See attached exhibits.) Nor has defendant denied his communications with the Supreme Court about plaintiff during a pending Grand Jury investigation, nor his revelation of raw Grand Jury evidence about plaintiff to them and his violating the secrecy of the Grand Jury, but has sought to justify same.

11. On January 17, 1973 an indictment was returned by the same State Grand Jury aforedesignated against the plaintiff herein, charging him with conspiracy, obstruction of justice, aiding and abetting the compounding of a crime, and *four counts of false swearing*.

12. On April 6, 1973 the Trial Court entered two orders denying plaintiff's previously made motions to dismiss the indictments and counts thereof, based upon the intrusion of the Deputy Attorney General into the Supreme Court

chambers, and his acquaintance of the New Jersey Supreme Court with the factual matters involved in a pending State Grand Jury investigation and the resultant coercive actions of both the Deputy Attorney General and the Supreme Court which deprived plaintiff of the voluntary exercise of his Fifth Amendment rights.

13. The plaintiff then filed two motions for leave to appeal the orders of the Trial Court aforesaid with the Appellate Division of New Jersey on April 16, 1973 and April 23, 1973 and a motion for leave to appeal these unheard motions and for certification from the Supreme Court on April 26, 1973.

14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pend-

ing against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. The conclusion must be that the State is engaging in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.C.A., Section 2283.

15. The plaintiff was arraigned on the Indictment SGJ 10-72-10 in this case on February 2, 1973. Trial on this indictment has been preemptorily set for May 14, 1973 and Trial Judge Arthur Salvatore has refused to grant any continuance for trial.

16. The State of New Jersey is made a party hereto so that complete relief may be afforded.

17. The plaintiff has been denied due process of law and fundamental fairness referable to the action of the defendants herein.

18. Just today (May 2, 1973) there was received from the Deputy Attorney General a motion returnable on May 11, 1973 in Trenton, completely reversing his posi-

tion heretofore made during preliminary motions in this case with regard to the introduction of testimony of the co-defendant of the plaintiff in the criminal action in the State of New Jersey.

WHEREFORE, plaintiff demands judgment as follows:

a) A temporary and permanent injunction restraining defendants from further prosecuting or proceeding on any charges arising out of and including Indictment No. SGJ 10-72-10;

b) For a temporary restraining order restraining the defendants from prosecuting said charges insofar as they apply to plaintiff until this matter can be heard and determined, and

c) For any other relief the Court may deem just and fair.

MARVIN D. PERSKIE, ESQUIRE and
PATRICK T. MCGAHN, JR., ESQUIRE
Co-Counsel for Plaintiff
By: MARVIN D. PERSKIE

Dated: May 2, 1973

(Verified by Edwin H. Helfant on April 27, 1973.)

Affidavits Annexed to Complaint

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } ss.:

EDWIN H. HELFANT, of full age, and being duly sworn according to law, upon his oath deposes and says:

1. On Wednesday, October 18, 1972, I appeared in front of the State Grand Jury in Trenton, and to the best of my recollection, I invoked my constitutional rights under the Fifth Amendment to four or five questions posed to me by the Attorney General. This was after a hearing before Judge Kingfield wherein my intended position to invoke my privilege was made clear to the Deputy Attorney General and the Court.

2. It was indicated that I would have to come back for another session.

3. On November 6, 1972, a call was received at my office at approximately 3:30 p.m. from the Administrative Director's Office with the information that my appearance was required in the Supreme Court Chambers on Wednesday, November 8th, at 9:50 a.m. I had called my office from Camden County and received this information, and immediately called Mr. McConnell, the Administrative Director of the Courts, and informed him that I had previously been served with a subpoena to appear before the State Grand Jury in Trenton at 10:00 a.m. on the same date. Mr. McConnell said that he was aware of this, and I should still be at the Supreme Court Clerk's Office at 9:50 a.m. on Wednesday, the 8th.

4. Accordingly, on Wednesday, the 8th, I proceeded to Trenton and arrived at the Supreme Court Clerk's Office at about 9:30 or 9:35 a.m. I was told to wait in the Clerk's office. At approximately 9:55 a.m. I was requested to proceed to the Supreme Court Chambers where the Supreme Court Justices were in conference. When I arrived, the Chief Justice asked me if I though a Judge should invoke the Fifth Amendment. I replied that I did not. I attempted to explain to the Chief Justice why I had done so in the past, but he did not want to get into the merits of the matter, and rightfully so. Mr. Justice Sullivan asked me if I sat in the municipal court since the time of my invoking the Fifth Amendment before the State Grand Jury, and I told him I sat on one occasion only. He then asked me what my feelings were about a Judge sitting in judgment of other people while he himself invokes the Fifth Amendment before a Grand Jury. I did not explain my reasons for doing so and indicated I would then appear before the Grand Jury that morning in Room 438, which was just down the hall from the Supreme Court Chambers, and would testify without invoking the Fifth Amendment.

5. When the subpoena for the November 8th State Grand Jury session had been served upon me by Detective Sullivan, and after I had invoked the Fifth Amendment on October 18th, Detective Sullivan told me I was going to receive immunity and be made a State's witness. I made no comment about same. Detective Sullivan asked me if I had ever talked to or met with Shelly Kravitz, one of the State witnesses in this case, and I answered in the negative. He asked me if I ever talked to Richard Cantone. I told him I did not know him and never talked to

him, and he asked me various other questions about the Hicks-Cantone matter. He asked me to verify my signatures on some photocopies of my checks that were signed by me.

6. To the best of my recollection, I was never advised when I appeared before the Grand Jury on November 8th that I was the target of a false swearing charge.

7. The Attorney General was instrumental in inducing me to waive my constitutional rights. Part of the reason I waived my constitutional rights was because of the fact that the Attorney General required me to appear before the Grand Jury on November 8th on the representation that the investigation by the Grand Jury pertained to the obstruction of justice, when in fact he knew and had already planned to have me indicted for false swearing, knowing from their past investigation and statements made by me prior to my appearance before the Grand Jury what my testimony would be as to what later developed to be the four counts of false swearing.

8. The basis for these counts of false swearing were set by the State's witnesses, two of whom are presently in prison, and were in prison at the time they testified before the Grand Jury. When I testified, I assumed I was waiving my constitutional rights with regard to being a target of the jury in connection with the obstruction of justice. The Attorney General already had the testimony of Kravitz and Cantone, and their answers to the questions that were then posed to me were made the basis of at least two of the false swearing charges.

9. I feel that the Attorney General was usiing the Grand Jury for the purpose of entrapping and indicting me, knowing full well as a lawyer and a judge, I would appear and testify to the questions posed in the false swearing charges, when they already had the testimony of the various central points of Kravitz and Cantone.

10. I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment. However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivam, I was concerned that in the event I concluded I should not testify the Supreme Court might have taken some action against me because of my refusal.

11. The co-defendant, Samuel Moore, did not appear at the time scheduled, but followed me into the Supreme Court Chambers by about twenty minutes to one-half hour, as I was standing in the corridor in front of the Grand Jury room and saw him enter.

12. When I left the Supreme Court Chambers, Deputy Attorney General Hayden entered, and came out after a brief interval. Again, when Samuel Moore left the Supreme Court Chambers, Deputy Attorney General Hayden entered, and emerged after a brief period of time.

EDWIN H. HELFANT

(Sworn to February 2, 1973.)

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } ss.:

EDWIN H. HELFANT, of full age, duly sworn according to law, upon his oath deposes and says:

1. On November 8, 1972, I appeared before the Justices of the Supreme Court of New Jersey in their chambers. Chief Justice Weintraub and Mr. Justice Sullivan asked me my thoughts concerning whether a municipal court judge should invoke the Fifth Amendment. (See my Affidavit of February 2, 1973). Then the Chief Justice asked me some questions about my son's Bar Mitzvah party. I can recall that the Chief Justice asked the following questions, among others:

a. Were Abe Schusterman and his wife invited guests?

b. Where were Mr. and Mrs. Schusterman seated in the room?

c. Where was Judge Ruffenbart seated?

The Chief Justice then asked me some questions about a certain ice making machine.

2. Neither the Chief Justice nor any of the Associate Justices had any notes or memoranda from which they were questioning me, but there was a closed folder of some sort on the table in front of the Chief Justice.

EDWIN H. HELFANT

(Sworn to March 6, 1973.)

Oral Testimony before Judge Kitchen

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

No. 607-73

TESTIMONY OF:

PATRICK T. MCGAHN JR., AND EDWIN H. HELFANT

BEFORE: HON. JOHN J. KITCHEN, U.S.D.J.

DATED MAY 9, 1973, CAMDEN, NEW JERSEY

(2)* The Court: Gentlemen, this is a return day for a motion in the matter of Edwin H. Helfant versus Kugler and others. Gentlemen, what is your intention as far as procedure is concerned? I have read your briefs. I read your affidavits. I don't need those repeated. I will be glad to hear anything in addition to that, that you would care to present; but don't repeat those, please. Who is going to speak for the plaintiff?

Mr. Perskie: I am Marvin D. Perskie of the firm of Perskie and Callinan, 3311 New Jersey Avenue, Wildwood, New Jersey, will speak for the plaintiff.

The Court: All right. You may proceed.

Mr. Perskie: I am also assisted by co-counsel, Patrick T. McGahn of Atlantic City, who is co-counsel, who is present at counsel table.

The Court: You may proceed, Mr. Perskie.

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* Numerals in parenthesis refer to each new page of the stenographic transcript.

Oral Testimony before Judge Kitchen

Mr. Perskie: If the Court please, we are prepared to introduce oral testimony if the Court will entertain it at this time. I have spoken to the Attorney General and he apparently is not prepared to proceed with (3) oral testimony.

The Court: All right. You may proceed with whatever you have.

Mr. Perskie: I would also like the right to reserve argument to respond to the brief of the Deputy Attorney General which I received at 3:15 yesterday, was delivered to me personally in Wildwood.

The Court: Mine was received about the same time.

Mr. Perskie: Mr. McGahn.

PATRICK T. MCGAHN, being first duly sworn, testified as follows:

Direct examination by Mr. Perskie:

Q. Mr. McGahn, you are licensed member of the Bar of the State of New Jersey; is that correct? A. Yes, sir.

Q. How long have you been a practicing attorney? A. Since 1959.

Q. And do you hold any other officer positions in the State of New Jersey? A. Yes, sir. I am District Supervisor for the New Jersey Transfer Inheritance Tax for the County of Atlantic, a position which I held for 16 years.

(4) Q. Directing your attention to October 18, 1972, did you at that time represent one Edwin H. Helfant, the plaintiff in this matter? A. Yes, sir.

Oral Testimony before Judge Kitchen

Q. And on October the 18th, 1972, where did your representation take you at that time; where were you? A. Took me to the State House Annex in Trenton, New Jersey in response to a subpoena that was issued to Mr. Helfant to appear before the Statewide Grand Jury.

Q. Did you appear with him at that time? A. Yes, sir. I appeared at the State House Annex in Trenton on that date at approximately 9:45 a.m. on the Fourth Floor of that Building.

Q. Who was conducting the Grand Jury proceeding to your knowledge at that time? A. The Attorney General's Office.

Q. What particular Deputy? A. Joseph Hayden.

Q. Do you know Mr. Hayden? A. Yes, sir, I do.

Q. And to your knowledge was he conducting the Grand Jury proceedings that were going on? A. Yes, sir, he and other members of the Attorney General's Staff.

Q. Now did Mr. Helfant in response to that subpoena (5) voluntarily enter the Grand Jury Room? A. No, sir, he did not.

Q. What transpired when you were at that hearing? A. Upon arriving in the morning I informed Mr. Hayden that Mr. Helfant would invoke his Fifth Amendment rights and that he would not testify. I went one step further. I advised Mr. Helfant not to even go into the Grand Jury Room. Conversation continued over that. During the course of the day Mr. Hayden called many other witnesses and at approximately 3:45, he asked me again whether or not Mr. Helfant would go into the Grand Jury Room. I told him we would invoke the Fifth and that I would not even let Mr. Helfant walk into the Grand Jury Room to invoke the Fifth because I felt under the Sarcone Case, he didn't even have to show himself—viewing himself in front of the witnesses might even prejudice himself as to the Fifth Amendment.

Q. Now, was there a Court hearing that transpired over this situation? A. As a result of that, Mr. Hayden, I believe, called Judge Kingfield and set up a hearing at approximately five minutes after four over in the Courthouse in Trenton.

Q. Now to conserve time, Mr. McGahn, you have read the complaint in this matter and the attachments thereto, have you not? A. Yes, sir.

(6) Q. And attached to the complaint is a transcription of the proceedings before Judge Kingfield? A. Yes, sir.

Q. Is that a true and accurate and complete transcription of what went on before Judge Kingfield on that date? A. Yes, sir, it is.

Q. Now after the hearing before Judge Kingfield— A. I might add one other thing, Mr. Perskie. Prior to the hearing both Mr. Hayden and I went into Judge Kingfield's Chambers at which time both of us presented our sides of the matter and I asked Judge Kingfield at that time for a delay of the matter so that I could further review the matter as to whether or not the Fifth Amendment went so far as to not have a witness even go into the Grand Jury Room. He said that since we couldn't agree, Mr. Hayden and I, that we would then go out into open Court and put it all on the record.

Q. Now after the hearing terminated, what action did you take next? A. I went back, it was approximately five minutes of five on that date; I went back to the State House Annex and I asked Mr. Hayden if he would accompany me to, I believe, the Supreme Court, Office of the Supreme Court—yes, in fact, it was the Supreme Court. I attempted to call Judge Leonard of the Appellate Division, who is in our area in Atlantic County. I couldn't locate him. I looked at the Lawyers (7) Diary and found

that Judge Matthews was the closest one to South Jersey. So, I caught Judge Matthews before he left his Chambers. Mr. Hayden and I both presented our arguments to Judge Matthews over the telephone at which time I requested a stay and it was denied by Judge Matthews. I then attempted to reach Justice Weintraub to no avail and then Mr. Helfant had no alternative at that time but to go in before the Grand Jury and invoke his Fifth Amendment rights. Now Mr. Hayden, prior to Mr. Helfant going in, said that he would ask him certain specific questions and he outlined what those questions were, and Judge Helfant indicated he would take the Fifth Amendment to each of the questions. Judge Helfant then proceeded from the Supreme Court Chambers to around the corner and down the hall to where the Grand Jury was waiting and at approximately 5:15 or 5:30, he went into the Grand Jury Room and emerged about five to ten minutes later.

Q. Now was there any conversation that took place in your presence either with you and Mr. Hayden or with Mr. Hayden and Mr. Helfant when you were present after this session with the Grand Jury terminated? A. I am sure there were conversations Mr. Perskie, but I don't know, I can't remember what they were.

Q. Now do you know whether or not Mr. Helfant was subsequently subpoenaed to reappear before the Grand Jury? A. Yes, sir, he was.

(8) Q. Do you know about when the subpoena was received and for what date it was received? A. I believe that he received the subpoena on the 27th or 28th of October, 1972.

Q. Did you personally see the subpoena? A. Yes, sir, I did. Mr. Helfant called me when he received the subpoena and indicated to me that it was served by a De-

tective Sullivan and I told him at that time that I would call Trenton and attempt to get a rush job on the transcript before Judge Kingfield so that we would have that available when we would go to Trenton again.

Mr. Perskie: Could I have this marked?
The Court: Marked for identification.

(Subpoena was marked P-1 for identification.)

By Mr. Perskie:

Q. Mr. McGahn, I show you P-1 for identification and ask you if you can identify that document, sir? A. Yes, sir. This is the subpoena that was a copy of which was given to me by Mr. Helfant either on the 28th or 29th of October, I don't recall.

Mr. Perskie: I offer this for the purpose of hearing if your Honor please.

The Court: Any objection, Mr. Laird? There is no dispute that he got the subpoena, (9) is there?

Mr. Perskie: No, I don't think so.

Mr. Laird: No.

Mr. Perskie: I am trying to bring things in that haven't come before you.

(The exhibit just referred to was received and marked P-1 in evidence.)

Mr. Perskie: With your Honor's permission, may I have this letter marked?

(Letter was received and marked P-2 for identification.)

By Mr. Perskie:

Q. Mr. McGahn, I show you P-2 for identification and ask if you can recognize and identify that document? A. Yes, sir. This is a letter written by me on October 31, 1972, directed to John F. Callinan, Esquire.

Q. Who is John F. Callinan? A. Partner of the firm of Perskie and Callinan of Wildwood, New Jersey.

Q. Why was that document sent to him rather than myself? A. Mr. Perskie, if you recall, you were down in Puerto Rico on a short vacation.

Q. All right. Now, did you write that letter after consultation with the defendant? A. Yes, I did.

(10) Q. And— A. Only that, but after consultation with Mr. Helfant I called Trenton in an attempt to speed up the transcript which I had ordered of the 18th and that explained, I think, the lag of two days between writing the letter to Mr. Callinan and the receipt of the transcript.

Q. Now did Mr. Helfant agree on the course of conduct you outlined in that letter? A. Well, yes, Mr. Perskie, he did.

Mr. Perskie: I'd like to offer this if your Honor please.

Mr. Laird: May I see it, please.

Mr. Perskie: This has been previously attached to exhibits that have been filed in this matter.

Mr. Laird: Yes.

The Court: May be marked.

(The letter was received and marked P-2 in evidence.)

By Mr. Perskie:

Q. Now Mr. McGahn, was there a subsequent appearance of Mr. Helfant before the State Grand Jury after this letter? A. Yes, sir.

Q. Do you remember when that took place? A. Yes, sir, it was the 8th of November, 1972.

(11) Q. And did you accompany Mr. Helfant to Trenton on that date? A. Yes, Mr. Perskie. In fact, you were with me, along with Mr. Helfant.

Q. And do you know from your direct communication with Mr. Helfant what his intention was at that time before he arrived at Trenton with regard to testifying? A. Yes, sir. He was going to take the Fifth Amendment.

Mr. Laird: May I just have a clarification on that question with regard to testifying as to what?

Q. As to anything? A. Yes, sir.

Mr. Laird: His intention to take the Fifth to anything?

The Witness: Yes, that was what he conveyed to me.

Q. Mr. McGahn, what time did you arrive at Trenton on November the 8th? A. We arrived there about 9:20 Mr. Perskie.

Q. And what floor was it? A. It was on the fourth floor of the State House Annex.

The Court: Aren't we getting too detailed, Mr. Perskie? I know where the Supreme Court is. Can we just get to whatever the meat of the (12) testimony is? Mr. McGahn is testifying to all these

details and I don't think they are disputed, are they Mr. Laird?

Mr. Laird: No, your Honor.

Mr. Perskie: I want to have a record. I don't want to burden or press the Court.

The Court: All right.

By Mr. Perskie:

Q. Now Mr. McGahn, who did you see in official position when you got to the fourth floor of the Annex?

Mr. Laird: What does he mean "official position"?

The Court: I don't know.

Q. I don't mean the janitor. Did you see an Attorney General or did you see—

The Court: Wasn't there—and I guess you will get to this—wasn't there a phone call from the Administrative Director?

Mr. Perskie: I will get to that through the one who directly received it.

Q. All right, I will lead you a little. Did you see Deputy Attorney General Hayden? A. I don't believe I saw him immediately upon arriving, but sometime between oh, quarter of nine and 10:30 I did.

Q. And was he conducting a session of the Grand Jury on (13) that date? A. There was a Grand Jury sitting, whether or not he was conducting it at that time, I don't know.

Q. Now do you know where Mr. Helfant went after he got to the State House? A. Yes, sir, I do. He went to the Clerk of the Supreme Court.

Oral Testimony before Judge Kitchen

Q. And where did he go after that? A. I believe he waited for a few minutes in the Clerk's Office while she made a telephone call and then he proceeded down the hall and into the Chambers of the Supreme Court. It is a room that is exactly opposite to where the Grand Jury was sitting at the other end of the hall, at approximately ten minutes of ten.

Q. How long was he in that room to your recollection? A. I would say no longer than fifteen minutes.

Q. Did you see anybody else go into that room either before or after Mr. Helfant went in? A. Shortly thereafter, Mr. Hayden went into the Supreme Court Chambers.

Q. Did you have a conversation with Mr. Helfant when he came out of the Supreme Court Chambers? A. Yes, sir, I did.

Q. What was his appearance at that time? A. Well, he was very, very upset. He appeared completely (14) white and he said, I am going to testify.

Q. And what did you say to him? A. I said, Eddy, you are crazy. I said, as far as I am concerned, the case against you is very weak and if you go in and testify, they will indict you for perjury or false swearing. I said, your testimony is going to be against three cons and I said, I feel very, very strongly about this; and I said, that as you know, that I have urged you from the very beginning not to testify. Mr. Perskie, I didn't get through to Mr. Helfant.

Q. What did he respond if you recall? What did he say? A. He said, it is my ticket, it is my ticket. You are not losing your ticket; and referring to that he meant the right to practice.

Q. And did I talk to him too? A. Yes, you did.

Oral Testimony before Judge Kitchen

Q. In the same vein? A. Yes, sir; in fact, even in stronger terms.

Q. Now after that conversation where did Mr. Helfant go? A. Mr. Helfant remained, I would say, outside the Grand Jury Room for at least, oh a half hour or so or maybe longer waiting to go in to testify.

Q. And did he go in and testify? A. Yes, he did.

Q. Did you ever have any conversation with Hayden or did (15) anyone have any conversation in your presence with Hayden that Helfant was going to testify voluntarily on any matter before that Grand Jury before he went into the Supreme Court Chambers? A. No. The only conversation that I can recall that I had with Mr. Hayden was the fact that Mr. Hayden was very careful. He came out and said that Mr. Helfant would testify about three matters and he said that he would give him his Fifth Amendment rights after it—prior to each of the matters. One, I believe, was an ice box, an ice machine, another was a watch and the third one was the Cantoni matter; but he said—Hayden was very specific, and he said, that Helfant could come out and would come out after each item and he was going to handle each item separately.

Mr. Perskie: I have nothing further, Mr. McGahn. If you want to cross examine.

Cross examination by Mr. Laird:

Q. Just a couple questions, Mr. McGahn. You first began to represent Mr. Helfant in this matter about when? A. I would say somewheres, oh, around the 11th or 12th of October.

Q. That was after— A. He had been served with the first subpoena, I believe.

Q. And he responded to that subpoena on October 18? (16) A. Yes, sir.

Q. Now the second subpoena you said he called or you called him-- A. No, he called me.

Q. Did he indicate what the subpoena was for? A. Testify before the Grand Jury, that was all.

Q. Not about any particular matter? A. He mentioned something about Detective Sullivan said something that he was going to grant him immunity or something to that. I don't recall the full conversation on that, Mr. Laird.

Q. Now when he arrived, this is for the second time to testify on November 8? A. Yes, sir.

Q. When he went into the Grand Jury the first time, what did he testify about?

When he went into the Grand Jury to testify for the first time on that morning? A. Are you talking about the 8th or 18th?

Q. The 8th, the second time he appeared? A. Well, it was either the ice machine or the watch, because Mr. Hayden was very clear and he came out and he was, I thought, went overboard so to speak, to inform me that he would separate each of the items and allow Mr. Helfant to come out, that they would separate investigations sort of.

(17) Q. Now that matter which is the subject matter of the indictment that's involved here, when did he testify about that incident? A. I know that was the last thing he testified about.

Q. And that was approximately how long after he had begun to testify before the Grand Jury? A. I don't know; it might have been just before noon or might have been in the afternoon, I just don't recall that; because there were many other witnesses and I recall and I think, there

was another hijacking case or heavy equipment case or something. You were running witnesses.

Q. Did he indicate to you that he wished to take the Fifth Amendment as to the stolen watch investigation?

Mr. Perskie: At what time?

Q. At any time? A. I don't recall; I really don't.

Q. Did he indicate to you that he wanted to take the Fifth Amendment with respect to the ice machine investigation? A. I don't recall, but I believe that it was his intention to take it to everything but I can't absolutely say concerning those two items, but I definitely know—

Mr. Laird: Thank you Mr. McGahn, you have answered the question.

The Witness: I'd like to finish.

The Court: No, you answered the question.

(18) *Redirect Examination by Mr. Perskie*:

Q. Did you have any other conversation or communication with regard to the defendant with regard to his Fifth Amendment before the appearance before the Supreme Court? A. No, other than—

Mr. Laird: With respect to what?

Mr. Perskie: That's what we'd like to know.

Q. Did he have any conversation—

Mr. Laird: With respect to any particular investigation?

Q. With regard to any matter being investigated by the State Grand Jury? A. Yes, sir. He said, that I be-

lieve, it was Justice Weintraub or Justice Sullivan asked him about the ice machine that was allegedly given to Judge Rauffenbart and also his seating arrangements at his Bar Mitzvah concerning his children.

Q. His son's Bar Mitzvah? A. His son's Bar Mitzvah, and that one of the reasons that I was concerned further about cautioning him on the Fifth Amendment especially on the 18th, was the fact that I saw two of the cons there, Kravitz and Schusterman, and there was a third man there that was subsequently identified as (19) Cantoni. I didn't know Cantoni. I wouldn't know him. I was involved in a case with him but we plead out and I don't recall I ever met Mr. Cantoni.

Mr. Perskie: That's all I have.

The Court: Anything further?

Mr. Laird: Just to indicate my objection about what is hearsay and to take that into consideration.

The Court: Thank you.

Mr. Perskie: I'd like to call Mr. Helfant now if the Court please.

EDWIN H. HELFANT, being first duly sworn, testified as follows:

Direct Examination by Mr. Perskie:

Q. Mr. Helfant, where do you reside, sir? A. 15 McArthur Boulevard, Somers Point, New Jersey.

Q. And you are a licensed member of the Bar of the State of New Jersey? A. I am, sir.

Q. And you are presently a Municipal Court Judge? A.

I am a Municipal Court Judge in two municipalities, but I have taken a voluntary leave of absence from both judgeships.

Q. Mr. Helfant, when was the first time you appeared (20) before a State Grand Jury in connection with the matters that we are concerned with today? A. On October the 18th, nineteen hundred and seventy-two.

Q. And by what means were you summoned before that Grand Jury? A. I was issued a subpoena by Detective Sullivan.

Q. Did you have any conversation with Detective Sullivan or the Attorney General Hayden with regard to your willingness to appear and testify before appearing before the Grand Jury on October the 18th? A. No, sir.

Q. Now you heard the testimony of Mr. McGahn with regard to the matter that transpired before the Grand Jury on October the 18th and before Judge Kingfield; are they correct to your knowledge? A. Yes, sir.

Q. Did you indicate to anybody on that date that you would appear voluntarily before the State Grand Jury and testify to anything? A. No, sir.

Q. Mr. Helfant, when did you receive any notices or subpoenaes from the State of New Jersey in connection with this matter? A. There was another Grand Jury Session on October the 25th where Judge Moore and this Abe Schusterman testified; (21) and on the 27th Detective Sullivan appeared at my office in Atlantic City and handed me the subpoena. I said to Detective Sullivan, I have already invoked the Fifth Amendment. What's this about? He said that the State was thinking about giving me immunity but that he wanted to make me a State's witness. I informed him, State's witness to what? And he said, when you get up there they will tell you.

Q. Did you tell him at that time that you would voluntarily appear and testify as to anything? A. There were no—

Q. Including ice boxes, Bar Mitzvahs, watches? A. There was no discussion whatsoever with Mr. Sullivan other than what are they going to give me immunity for and when you get up there they are going to tell you.

Q. Mr. Helfant, directing your attention to November the 6th, were you in your office on that date? A. No, sir.

Q. Did you have communication with your office on that date? A. Yes.

Q. As a result of your communication with your office on November the 6th, 1972, what did you learn about this case, if anything? A. I had learned the Administrative Director's Office called my office and left a phone number at approximately 3:35 p.m. (22) from the Sheraton Post Motor Inn in Cherry Hill or I think it is Cherry Hill—I put in a call to Mr. McConnell.

Q. Did you speak to him directly? A. I spoke to Mr. McConnell.

Q. And what was the conversation? A. Mr. McConnell told me the Supreme Court wanted to see me at 9:50 a.m. on Wednesday the eighth, which was two days later, the day in between being Election Day. I said to Mr. McConnell that I have a Grand Jury subpoena for 10:00 a.m. on November the 8th. He said, the Court—he didn't say he was—he said the Court is aware of that and they want you at 9:50 in the Clerk's Office. I said, can you tell me what it is in reference to? And he said, the Supreme Court wants to talk to you.

Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.

Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

(23) Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.

Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Pescoe (sic) took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be (24) seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such a short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? (25) A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled checks; and he then began to inquire about

this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely (26) recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify.

Q. And why did you make that decision? A. Well Mr. Perskie, the complete aura of the room and the way the questions were posed to me and the manner in which the Chief Justice posed his question to me, frankly, I was scared.

Q. Scared of what? A. I didn't know what they were going to do to me because I had known the nature of the witnesses that had testified before this Grand Jury. I had

seen the Chief Justice posing questions to me about what the Grand Jury later asked me about. I didn't know whether they were going to take my license away to practice law or suspend me pending a hearing. Quite frankly, I knew that the judgeships would go out the window the minute I intend to invoke the Fifth from Justice (27) Sullivan's conversation to me and I was shook as I am right now.

Q. And when you came out of the Supreme Court Chambers were you confronted by your counsel? A. Patty asked me what went on? I said, Pat, I am going to testify.

Q. What did your counsel advise you at that time? A. Well Patty at first said I was making a mistake and that he drew an analogy to another case and he said the only thing they can get you in for is false swearing or perjury. They have no case. I said, Pat, it is my ticket and it is my kids and I am going to testify.

Q. You were concerned about your livelihood? A. Sure, concerned about it right now.

Q. Now Mr. Helfant, did you keep up with the newspaper publicity in this case? A. I sure did.

Q. And did you read the papers outside of the Atlantic County jurisdiction? A. Yes, sir.

Q. Now was there anything to your knowledge in the newspapers with regard to the questions that Chief Justice Weintraub asked you about, your Bar Mitzvah, the liquor, the favors, the seating arrangements? A. None to my knowledge. In fact, I know there wasn't.

(28) Q. When did you first read about any of these items in the newspaper? A. On December the 7th, approximately a month after my Grand Jury appearance.

Mr. Perskie: With the Court's permission, may I have this marked?

The Court: Yes, you may have marked.

(Newspaper article was marked P-3 for identification.)

Q. I show you P-3 for identification and ask you if this is the newspaper article where you first saw these items I have referred to? A. This is the beginning of a few other articles, but this is the first time that it appeared in a newspaper to my knowledge.

Q. And the date of that newspaper is what? A. December 7, 1972.

Q. And what newspaper is that? A. The Press, published in Atlantic County.

Mr. Perskie: I offer this if the Court please.

The Court: May be marked.

(Newspaper article was received and marked Exhibit P-3 in evidence.)

Mr. Perskie: That's all I have.

(29) *Cross examination by Mr. Laird*:

Q. Mr. Helfant, how long have you been a lawyer in the State of New Jersey? A. Since nineteen hundred and fifty-three.

Q. And how long have you been a Municipal Judge? A. I was appointed in Somers Point, New Jersey in April of nineteen hundred and sixty and served there up until 1969, when I was not reappointed; then reappointed again in June of '72 and I have been serving up until the leave of absence in Galloway Township, New Jersey from—don't hold me to the date Mr. Laird, but—I mean the month, but it is 1966 up until the present time.

Q. Now when you appeared on October 18, you refused initially to go into the Grand Jury, is that correct? A. On advice of Mr. McGahn after he had seen Cantoni, Kra-

vitz and Schusterman, he said, I don't even want you to go into the Grand Jury Room.

Q. Did you then attend a hearing before Judge Kingfield? A. Yes, I did.

Q. That hearing was in open Court, was it not? A. Well, there was some conversation in Chambers Mr. Laird, between Mr. Hayden and Mr. McGahn while I was in the Corridor; then it was in open Court.

Q. There was a hearing in open Court? (30) A. Yes.

Q. After that you returned into the Grand Jury; is that correct? A. Well, yes, we returned. We couldn't get a cab, we ran back.

Q. And did you then go into the Grand Jury? A. Yes.

Q. Now after that testimony, did you not have a conversation with Mr. Hayden with respect to the case involving an ice machine? A. No, sir. I had another conversation with Mr. Hayden.

Q. Did you have a conversation with respect to Judge Rauffenbart? A. No, sir. I had a conversation with Mr. Hayden about why don't I cooperate with him and give him somebody in Atlantic County.

Q. Did you have any discussion with him about a stolen watch? A. No, sir.

Q. Now when you returned November 8th, I believe when you appeared before the Supreme Court? A. Yes, sir.

Q. Now at any time did any member of the Supreme Court threaten to move against you to remove your license? A. Absolutely not.

(31) Q. Did they threaten at all to remove you as a Municipal Judge? A. No, sir, not verbal threats; no, sir.

Q. It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury? A. Yes, sir.

Q. And there had been no action taken against you, had there, as a lawyer or Municipal Judge? A. No, sir; that's what upset—

Q. Excuse me. A. That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q. Did they indicate what the consequences of your— A. They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q. Did Mr. Hayden threaten to take any action against you to have your license removed? A. Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q. Just answer the question. A. About the Supreme Court?

(32) Q. No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no? A. Not to take it away from me, no.

Q. Did he threaten to take any action to remove you as a Municipal Judge? A. No.

Q. Did he at all times advise you of your rights before you testified? A. In the Grand Jury Room, yes.

Q. Now you stated today that the Chief Justice said at the conclusion, I believe, of your little meeting with them, "What do you intend to do today?" Now is it not a fact Mr. Helfant that you filed affidavits in this particular case over two months ago? A. I filed some affidavits, yes, sir.

Q. And did you not in that affidavit discuss what went on in the Supreme Court Chambers? A. Somewhat, yes.

Q. And did you ever say that the Chief Justice had said, "What do you intend to do today?" A. The Chief Justice didn't—

Q. Could you just answer the question? A. No, I didn't say that at all.

Q. All right. Thank you. Mr. Hayden and Mr. Sullivan filed affidavits in this case as you know, almost two months (33) ago and in that affidavit of Mr. Hayden, he indicated that you did have a discussion with him after your taking the Fifth Amendment on October 18?

Mr. Perskie: If the Court please, I would object to Mr. Hayden's affidavit. Mr. Hayden is a party defendant in this matter. He hasn't appeared. We tried to get him to state in Court on innumerable occasions what his position was and he has refused to do so. He's claimed a privilege; he's claimed a certain right of interdepartmental—

The Court: Affidavits are on record. How can I disregard them?

Mr. Perskie: Because I think the man should be here subject to cross examination.

Mr. Laird: That's his opinion and the affidavits have indeed been on record and I am cross examining this witness.

The Court: You may proceed, Mr. Laird.

By Mr. Laird:

Q. Now I will return to it. Those affidavits by Mr. Hayden and Mr. Sullivan were, in fact, submitted over two months ago. In the affidavit of Mr. Hayden he states and I can quote it to you—let me get it right—excuse me just a minute, your Honor.

(34) The Court: All right.

Q. Paragraph three of the affidavit he states, "That upon leaving the Grand Jury around 5:30 or 6:00 pm., Detective Sullivan and I spoke briefly to Helfant. Helfant was then informed that the State Grand Jury was also investigating his connection with an ice machine, which was procured by Abe Schusterman with a bad check and ultimately given to Judge Thomas Rauffenbart and Helfant expressed a desire to testify about this matter."

Now, Mr. Helfant, that was on record for almost two months before you took any issue with that statement. Is it your testimony now that you directly refute that statement? A. Absolutely. There is not such conversation. It was the conversation I related to.

Q. Thank you. Is it not a fact that you did not respond in your affidavit for at least two months to that particular statement? A. I don't know whether Mr. Perskie responded or not to that affidavit.

Q. Well, it is your affidavit, is it not? A. My affidavit attached to this proceeding.

Q. Anywhere in the proceeding did an affidavit in this proceeding respond to that statement within those two months? A. I don't know.

Q. Thank you. You stated that you were very concerned (35) about your livelihood and whether you might lose your license to practice and whether you might be removed as a Municipal Judge, when you appeared before the Supreme Court Chambers. Were you not equally concerned three weeks earlier when you went into open Court and it became a matter of public record that you indeed took the Fifth Amendment, a lawyer and a judge took the Fifth Amendment before the Grand Jury? A. Of course

I was concerned Mr. Laird; but I was acting on advice of Mr. McGahn after we saw the nature of the State's witnesses, the caliber of the State's witnesses.

Q. And Mr. McGahn's advice to you after your appearance before the Grand Jury was not to testify, was it not? A. On the 18th?

Q. On the 8th? A. After I left the Supreme Court?

Q. After you left the Supreme Court? A. No one in this world could have made me take the Fifth.

Q. You did not act on his advice? A. No, sir.

Redirect Examination by Mr. Perskie:

Q. Was any counsel with you or invited in with you to the Supreme Court Chambers? (36) A. No, sir.

Q. Did you put your entire conversation with the Supreme Court in the prior affidavits filed in this matter? A. Mr. Perskie, if you recall, I made you rewrite that affidavit four or five times, because I was very reluctant to file any affidavit about any proceeding with the Supreme Court, because I was then, as I am now, concerned about my confrontation with the Supreme Court.

Mr. Perskie: That's all I have.

The Court: I'd like to ask one question of Mr. Helfant if I may. I want to ask you about the affidavit which you have filed and I want to ask you whether or not this statement was in it if you can recall, and this I am quoting from the context of the papers on file. "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

The Witness: Yes, sir.

The Court: That is your statement?

The Witness: Yes, sir.

The Court: Thank you, sir. You may step down.

(37) Mr. Perskie: If your Honor please, with all due respect to the Court, that is taken out of context and I'd like to have the balance of the paragraph read into the record.

The Court: All right, you can read it.

Mr. Perskie: This is the balance of the paragraph, is it not Mr. Helfant? "However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivan, I was concerned that in the event I concluded I should not testify, the Supreme Court might have taken some action against me because of my refusal." That is the balance of your sentence?

The Witness: Yes, sir.

The Court: That was your assumption?

The Witness: Yes, sir, because—

The Court: Nothing was said by the Court that that would happen?

The Witness: No, sir; but I imagined from the fact that they did not discuss anything else with me except the questions that were later posed to me at the Grand Jury, and frankly, the Chief Justice's tone to me, I decided I was going to testify.

(38) The Court: Thank you very much.

The Witness: Your Honor, there is no question pending, but may I say something to the Court?

The Court: No. It is very unusual even from a lawyer. You have counsel here representing you.

Oral Testimony before Judge Kitchen

The Witness: May I be excused for one second to discuss something with counsel and resume the stand?

The Court: All right.

(Discussion off the record.)

The Witness: I have nothing further, your Honor.

The Court: All right gentlemen, thank you.

(Mr. Perskie argued on behalf of the plaintiff.)

(Mr. Laird argued on behalf of the defendants.)

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CERTIFICATE

I, DOROTHY C. Boss, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the testimony and proceedings had before me.

/s/ Dorothy C. Boss
DOROTHY C. Boss, C.S.R.

Dated: May 10, 1973

Oral Opinion of Judge Kitchen

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Oral Opinion—No. 607-73

Before: HON. JOHN J. KITCHEN, U.S.D.J.

Dated May 9, 1973, Camden, New Jersey

(2) The Court: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those (3) injuries that are usually incidental to every criminal proceeding. Third:

That the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the (4) incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to

hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to (5) state a claim is hereby granted.

You may prepare the order Mr. Laird.

Mr. Perskie: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

The Court: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

• • •

CERTIFICATION

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate partial transcript of the testimony and proceedings had in the above entitled cause.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 9, 1973

Order of United States District Court Granting Petitioner's Motion to Dismiss the Complaint, dated May 9, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 607-73

EDWIN H. HELFANT,

Plaintiff,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, *et als.*,

Defendants.

This matter having been opened before the Court by Marvin D. Perskie and Patrick T. McGahn, Jr., co-counsel for the plaintiff, Edwin H. Helfant, an Application for an Injunction against a State Court criminal proceeding under 42 United States Code Annotated Section 1983 and under 28 United States Code Annotated Section 1343, and cross motion having been made by the defendants to dismiss the complaint on the grounds that the court does not have jurisdiction and on the grounds that the complaint does not state a claim upon which relief can be granted, and coming on to be heard in the presence of Edward C. Laird, Deputy Attorney General of the State of New Jersey, attorney for the defendants, and argument having been considered together with briefs, affi-

Order of United States District Court Granting Petitioner's Motion to Dismiss the Complaint dated May 9, 1973

davits, certified pleadings and oral testimony having been heard,

IT IS, on this 9 day of May, 1973

ORDERED and ADJUDGED that the United States District Court for the District of New Jersey has jurisdiction over the subject matter.

IT IS FURTHER ORDERED and ADJUDGED that the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted be and is herewith GRANTED. Application for stay pending appeal is denied.

JOHN J. KITCHEN
Judge, U. S. District Court

I consent to the entry of the above Order.

EDWARD C. LAIRD
Deputy Attorney General

I consent to the form of the above Order.

MARVIN D. PERSKIE
Co-Counsel for Plaintiff, Edwin H. Helfant

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(CIVIL ACTION No. 607-73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 7, 1973

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

Before:

STALEY, ADAMS and GIBBONS, Circuit Judges

PERSKIE & CALLAHAN, ESQS.
By: MARVIN D. PERSKIE, ESQ.
PATRICK T. MCGAHN, JR.
3311 New Jersey Avenue
Wildwood, New Jersey 08260
Attorneys for Appellant

GEORGE F. KUGLER, JR., ESQ.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attorney for Appellees

OPINION OF THE COURT

(Filed—September 10, 1973.)

PER CURIAM

This is an appeal from an order of the district court which (1) denied plaintiff's motion for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state, and (2) granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, but in view of its ruling on the defendants' motion made no findings of fact.

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

The plaintiff-appellant Helfant is a member of the New Jersey bar and a former municipal court judge of that state. His verified complaint alleges:

> "4. Some time before October 18, 1972 the State of New Jersy began a State Grand Jury Investigation, inter alia, into an alleged illegal withdrawal on an indictable criminal charge of atrocious assault and battery arising out of an incident occurring on March 17, 1968 in Egg Harbor City, Atlantic County, New Jersey, in which the plaintiff was alleged to have participated. This State Grand Jury investigation was personally conducted by the defendant, Joseph A. Hayden, Jr., Deputy Attorney General of the State of New Jersey.
>
> 5. The plaintiff, Edwin H. Helfant, was a designated target of the State Grand Jury investigation and was so advised by the Deputy Attorney General aforedesignated, who was handling the matter, when he first appeared before the State Grand Jury on October 18, 1972 at which time he resorted to his privilege under the Fifth Amendment of the United States Constitution and refused to testify.
>
> 6. He was subsequently subpoenaed to appear again before the State Grand Jury on November 8, 1972. The State Grand Jury at that time sat at the State House Annex, Trenton, New Jersey at the other end of the hall from the private chambers of the Chief Justice and Justices of the New Jersey Supreme Court.

Opinion of the United States Court of Appeals for the Third Circuit, dated September 10, 1973

> 7. On November 6, the Administrative Director of the Courts of New Jersey called the law offices of the plaintiff in Atlantic City, New Jersey. About 3:30 in the afternoon, after being given the message of this call, plaintiff returned the call to the Administrative Director. He was directed by the Administrative Director to appear before the Supreme Court in their private chambers at 10 minutes before 10 on November 8, 1972. The plaintiff advised the Administrative Director that at 10 o'clock he had to appear before the Grand Jury. The Administrative Director advised the plaintiff that the Supreme Court was well aware of this fact and that he was still to be before the Supreme Court. No reason was given for this appearance and no other direction to appear, other than the telephone message of the Administrative Director made to the plaintiff directly, and to his office. At or about the designated time on November 8, 1972 the plaintiff went into the chambers of the Supreme Court at the State House, Trenton, New Jersey. He was questioned by the Chief Justice and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some

questions about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and an ice-making machine that was involved in a.. d pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arrangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

After the plaintiff left the Supreme Court chambers, he was in a state of confusion and bewilder-

ment and had to go immediately before the State Grand Jury. On a previous occasion before the State Grand Jury he had encountered three State's witnesses who were then in State and County Prisons serving sentences for various crimes, two of said witnesses having long records. He had been advised by Detective William Sullivan of the New Jersey State Police, who was assisting Deputy Attorney General Hayden in the investigation, of the thrust of some of the testimony of these witnesses, which testimony if believed would incriminate the plaintiff. He was therefore in a position that if he testified at variance with these witnesses, even though it were the truth, the State Grand Jury would be faced with inconsistent statements and could indict him for false swearing, as he was. He was faced with the proposition that if he agreed with the testimony of these witnesses, he could be indicted for conspiracy, as he was. Knowing of these witnesses, i.e., John Cantoni, Shelly Kravitz and Abe Schusterman, their reputations and backgrounds and long records of convictions, plaintiff was aware that they had to have testified as a result of promises and commitments made to them in connection with shortening their prison stays, which facts were later admitted by the Deputy Attorney General Joseph A. Hayden, Jr. in connection with answers made to discovery wherein he admitted that recommendations of leniency and dropping of charges had been made in the cases of all three men.

8. As a result of these questions, the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well.

9. Immediately after the plaintiff left the chambers of the New Jersey Supreme Court, Deputy Attorney General Joseph A. Hayden, Jr., who was then conducting the State Grand Jury investigation of which plaintiff was a target, went into the Supreme Court chambers and stayed there for a short period of time and then left. It is believed he preceded the plaintiff into the chambers and that he had previous contact about plaintiff with the Supreme Court about the pending investigation."

The complaint also alleges:

"14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him."

Insofar as this appeal reviews the order dismissing Helfant's appeal for failure to state a claim upon which delief may be granted these factual allegations must be taken as true.

The opposing affidavits filed by the state defendants in opposition to Helfant's motion for a preliminary injunction do not dispute any of the historical factual allegations of the Complaint quoted above, except that defendant Hayden avers:

"I had no knowledge that Helfant was to appear before the New Jersey Supreme Court until I was called by the Supreme Court on November 6, 1972 and told that Helfant might be a few minutes late for his grand jury appearance."

Read in the light most favorable to those defendants, the affidavits do tend to suggest that Helfant's testimony before the grand jury was the result of a voluntary waiver of his privilege against self incrimination rather than of any compulsion by the Supreme Court. It is fair to say that for purposes of the motion for a preliminary injunction, whether Helfant's testimony was the result of compulsion was put in issue and that this issue could be resolved only by an evidentiary hearing.

At the evidentiary hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and testified himself. On the disputed issue of compulsion to testify before the grand jury this testimony by Helfant is relevant:

"Q. Now you went to Trenton on November the 8th in the company of your two attorneys? A. Both you and Mr. McGahn.

Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton? A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

Q. When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not? A. Yes.

Q. And you were subsequently ushered into the Supreme Court private Chambers? A. Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Peskoe took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q. Conference Room. Do you know how many Judges were there? A. To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q. Were they sitting in their robes? A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in? A. I walked in and without any good mornings or anything else, the Chief Judge asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q. Now were they sitting down, the Judges? A. Yes, they were seated.

Q. Were you standing or— A. Mr. Perskie, I don't remember if they told me to be seated or if I was standing up.

Q. And what was your state of mind and your feelings as you entered those Chambers? A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can? A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't

want to go into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation? A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond? A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice? A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court? A. It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q. And when you came out— A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today? A. And what did you tell him? A. I said, Mr. Chief Justice, I am going to testify."

The district court denied preliminary relief and dismissed the complaint on the ground that *Younger* v. *Harris,* 401 U. S. 371 (1971) precluded federal intervention. In the posture in which the case is before us, the district court has ruled only on the legal sufficiency of the complaint, and has not made any findings of fact. Whether or not Helfant's testimony before the grand jury was voluntary or coerced is a crucial fact issue. Although no testimony was offered by the state defendants, on that crucial fact issue the district court, had it made factual

findings, might have found Helfant's testimony not credible, and might on this ground have declined to issue a preliminary injunction. But for purposes of a motion to dismiss pursuant to Rule 12(b)(6) that possibility is irrelevant. In reviewing the order granting that motion we must take as true Helfant's contention that he was coerced by the Supreme Court of New Jersey into testifying before the grand jury and that he is about to be tried on an indictment resulting from that coerced testimony. The record establishes that a trial court has declined to quash the indictment and that attempts to obtain interlocutory appellate relief in the New Jersey courts have been unavailing. Even if at a later stage a New Jersey trial court were to quash the indictment the state could appeal that decision to the Supreme Court of New Jersey. *See, e.g., State* v. *Winne,* 12 N. J. 152 (1953).

Younger v. *Harris, supra,* holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or ". . . other extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 53. *See Lewis* v. *Kugler,* 446 F. 2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 447 F. 2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the *Younger* v. *Harris* line of cases is predicated upon the fundamental assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional

right at issue. Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his fifth amendment privilege against self incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey, and ultimately in that Court, hardly seems adequate.

We hold, then, that *Younger* v. *Harris, supra* did not require the dismissal of the complaint. That holding requires a reversal and remand.

The order denying the preliminary injunction is also predicated upon *Younger* v. *Harris, supra.* We did not hear the testimony of Mr. McGahn and Mr. Helfant, and we cannot judge the credibility of Helfant's testimony that he was coerced. At the same time, on the record before us his testimony is not contradicted except by affidavits, and those affiants have not been cross examined. The record is sufficient to suggest that the satus quo be preserved until such time as the district court can make findings of fact. Mindful that present or even potential interference with a pending state prosecution is a matter of utmost gravity, this case should on remand receive accelerated consideration and the court should enter an order consolidating the hearing on the motion for a preliminary injunction with a trial on the merits. Rule 65(a)(2) Fed. R. Civ. Proc.

At the oral argument on this appeal we asked the attorney for the appellees if the State intended to commence the trial of the indictment, now scheduled for September 10, 1973, while this appeal was *sub judice*. We were advised that this was the State's intention. Accordingly we issued an order enjoining commencement of the prosecution until such time as we could decide the appeal.

The order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated, and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits. We direct that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this court. The mandate of this court shall issue forthwith.

ARLIN M. ADAMS, *Circuit Judge*, concurring:

I concur in the result reached by the majority in this matter. Although the doctrine of *Younger* v. *Harris* generally precludes a federal district court from enjoining a criminal proceeding already under way in the state court, there are limited exceptions to this wise rule of comity. One of those exceptions, as I read *Younger*, arises when "extraordinary circumstances" or "unusual circumstances," 401 U. S., at 53 and 54, exist. As the recitation set forth in the majority opinion demonstrates,

it would seem to me that such extraordinary or unusual circumstances are asserted here so as to make it appropriate for the district court to proceed with findings of fact and conclusions of law.

The plaintiff claims, both in his pleadings and in his evidence, that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that as a result, he was indicted because of his allegedly coerced testimony. He sought, in the state court, to have the indictment dismissed because it was based on the coerced testimony, but his motion was refused, and the state appellate courts declined to entertain his appeal.

If the district court should determine, after an appropriate evidentiary inquiry, that this plaintiff's Fifth Amendment right *has* been abridged, in the factual setting of this case an exception to Younger's precept of non-interference would obtain.[1]

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[1] Although the plaintiff names as defendants the Justices of the Supreme Court of New Jersey as well as that State's Attorney General, the final injunction, if issued, may be limited to the Attorney General, prohibiting him from continuing criminal proceedings against plaintiff. It should also be noted that plaintiff does not seek money damages.

Certified Judgment in Lieu of Mandate, dated September 10, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

STALEY, ADAMS and GIBBONS, Circuit Judges

Certified Judgment in Lieu of Mandate, dated September 10, 1973

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which order dismissed the complaint for failure to state a claim upon which relief could be granted, be and hereby is reversed. The order of May 9, 1973, of the said District Court which order denied plaintiff's motion for a preliminary injunction be and hereby is vacated and the cause remanded to the District Court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ 10-72-10 until final hearing, and for the entry of an order consolidating hearing on the motion for a preliminary injunction with trial on the merits, and it is directed that that trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the date of the mandate of this Court, all in accordance with the opinion of this Court.

ATTEST:

THOMAS P. QUINN
Clerk

September 10, 1973

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing En Banc, dated October 31, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(Civil Action No. 607-73)

Present:

SEITZ, Chief Judge, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

Order Vacating Judgment, Granting Petition for Rehearing and Denying Petition for Rehearing En Banc, dated October 31, 1973

ORDER

The Petition for Rehearing filed by the defendants-appellees having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the Circuit in regular active service, and the judges who concurred in the decision of the panel which heard the appeal having voted for panel rehearing,

It is ORDERED that the Petition for Rehearing en banc is denied, and it is further

ORDERED that the judgment of this court dated September 10, 1973 be and is hereby vacated, and the Clerk of this Court shall list this appeal for submission to a panel consisting of Judges Staley, Adams, and Gibbons pursuant to Rule 12(6) on November 19, 1973, and it is further

ORDERED that the parties shall, simultaneously, on or about November 10, 1973 file with the court supplemental briefs on the question whether, assuming appellant's testimony before the grand jury was coerced, he has standing on the ground to object to a trial on Indictment No. SGJ-10-72-10 or on any count thereof. *See Gelbard* v. *United States,* 408 U. S. 41, 60 (1972); *United States* v. *Blue,* 384 U. S. 251 (1966); *Lawn* v. *United States,* 355 U. S. 339 (1958); *compare Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

By the Court,

JOHN J. GIBBONS
Circuit Judge

Dated: October 31, 1973

Order Granting Rehearing En Banc, dated January 11, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Appellees.

(Civil Action No. 607-73)

Present:

SEITZ, Chief Judge, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

A majority of the active Judges having voted for rehearing en banc in the above-entitled case,

It is ORDERED that the Clerk of this Court list the above case for rehearing before the Court en banc at the convenience of the Court.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: January 11, 1974

Opinion of the United States Court of Appeals for the Third Circuit, *En Banc*, dated July 8, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

v.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDEN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 607-73)

Opinion of the United States Court of Appeals for the Third Circuit, En Banc, dated July 8, 1974

Argued September 7, 1973

Submitted Under Third Circuit Rule 12(6)
November 19, 1973

Before: STALEY, ADAMS and GIBBONS, *Circuit Judges.*
Reargued April 10, 1974

Before: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed—July 8, 1974.)

Perskie & Callinan, Esqs.
By Marvin D. Perskie, Esq.
Patrick T. McGahn, Jr., Esq.
Wildwood, New Jersey
Counsel for Appellant

George F. Kugler, Jr., Esq.
Attorney General of New Jersey
Trenton, New Jersey

David S. Baime, Deputy Attorney General
Alfred J. Luciani, Deputy Attorney General
Edward C. Laird, Deputy Attorney General
Counsel for Appellees

ALDISERT, *Circuit Judge.*

Presenting a delicate question of federal-state comity, this appeal requires us to decide whether federal fact-

Opinion of the United States Court of Appeals for the Third Circuit, En Banc, dated July 8, 1974

finding should be utilized to determine whether a New Jersey municipal court judge's testimony before a state grand jury was the product of a free and unconstrained will. Contending that his Fifth Amendment rights as guaranteed by the Fourteenth Amendment will not be vindicated by the New Jersey state court system, appellant argues that the federal courts should provide relief because highly unusual circumstances dictate an exception to the familiar restrictive rule of *Younger* v. *Harris,* 401 U. S. 37 (1971).

I.

This is an appeal from an order of the district court which (1) denied plaintiff's request for a preliminary injunction prohibiting the Attorney General of New Jersey and others from proceeding with the prosecution of an indictment pending in that state,[1] and (2) granted the de-

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[1] The plaintiff was arraigned on the Indictment SGJ 10-72-10 on February 2, 1973. Trial was originally set for May 14, 1973.

The state's brief in support of its motion to dismiss in the district court discloses:

> Plaintiff herein, Edwin Helfant, stands charged in a nine count indictment handed up by the State Grand Jury charging him with conspiring with his codefendant, Samuel Moore, to obstruct justice, with obstructing justice in connection with his codefendant, Samuel Moore, with aiding and abetting compounding a crime and with four counts of false swearing. * * * All of the substantive offenses stem from the wrongful dismissal of an atrocious assault and battery complaint which resulted from a fight in a tavern in Egg Harbor City on March 17, 1968. The false swearing counts in the indictment stem from the appearance of the defendant before the grand jury on November 8, 1972.

fendants' motion, under Rule 12(b)(6) F.R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court held an evidentiary hearing on the motion for a preliminary injunction, and made limited findings of fact. The appeal was argued before a panel of this court on September 7, 1973. Deeming the issues raised to be substantial, the trial on the challenged indictment being scheduled to commence on September 10, 1973, and the Attorney General of New Jersey declining to postpone it until the panel could decide the case, the panel entered an order enjoining the prosecution until such time as the appeal could be decided. Panel opinions were filed on September 10 reversing and remanding for further proceedings. Thereafter, representing that the State was willing to delay plaintiff's trial until disposition of the application for rehearing, the state attorney general petitioned for rehearing. Based on that representation, we recalled our mandate on September 21, 1973. Rehearing was granted before the panel; supplemental briefing was ordered on certain issues suggested by the appeal which had not been previously briefed or argued; and the panel subsequently granted some relief, one judge dissenting. Because of important federal-state comity questions, the full court subsequently agreed to hear the case in banc.

II.

Plaintiff-appellant Helfant, a member of the New Jersey bar and a former municipal court judge of that state, alleged in a verified complaint that he had been advised that he was the target of a state grand jury investigation into an alleged withdrawal of a criminal charge of

atrocious assault and battery. Armed with this information, and asserting a Fifth Amendment privilege, Helfant refused to testify when he first appeared before the state grand jury on October 18, 1972. He was subsequently subpoenaed to appear again before the grand jury on November 8, 1972, which was then sitting at the Trenton State House Annex on the same floor as the chambers of New Jersey State Supreme Court justices. Helfant was also directed to appear before the justices of the Supreme Court in their private chambers 10 minutes before his scheduled re-appearance before the grand jury.

The complaint averred that upon his appearance in the Supreme Court chambers, several justices asked questions about the subject matter of the grand jury investigation, including matters not then made public and also including inquiries concerning certain witnesses who has testified against Helfant before the grand jury.[2]

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[2] Helfant's complaint avers:

He was questioned by the Chief Justice [Weintraub] and Associate Justice Sullivan in the presence of the Court. The Chief Justice inquired of the defendant whether he thought a Judge should invoke the Fifth Amendment. Justice Sullivan asked what the plaintiff's feelings were about a Judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before a Grand Jury. He also asked plaintiff if he had sat as a Judge since invoking the Fifth Amendment. Chief Justice Weintraub and another Justice also asked of plaintiff some question about his son's Bar Mitzvah, which matters were contemporaneously being considered by the State Grand Jury, including seating arrangements and who paid for the liquor. These questions also concerned an Abe Schusterman, who was a State's witness against

(Footnote continued on following page)

His complaint averred that "[a]fter . . . [he] left the Supreme Court chambers, he was in a state of confusion and bewilderment and had to go immediately before the State Grand Jury. * * * As a result of these questions, [by justices of the Supreme Court,] the plaintiff, whose previous counsel-advised intentions and will were completely discarded and overcome and who was quite emotionally upset by the confrontation, indicated to the Justices that he would indeed waive his Fifth Amendment privilege and testify in full before the State Grand Jury, fearing not only the loss of his Judgeship, but his accreditation as a member of the bar as well."

Helfant also averred that Deputy Attorney General Hayden, conducting the grand jury investigation, entered

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(Footnote continued from preceding page)

the plaintiff and who had appeared before the State Grand Jury. The Chief Justice also questioned plaintiff about Atlantic County Judge Thomas Rauffenbart and about an ice-making machine that was involved in an alleged pay-off in a criminal case involving Abe Schusterman, all of which matters were then being considered and investigated by the State Grand Jury which was being conducted by the defendant Joseph A. Hayden, Jr. under the direction of Attorney General George F. Kugler.

The questions posed to the plaintiff by the Justices of the Supreme Court were in connection with matters then being considered by the State Grand Jury. There had been no public release of these matters, particularly the Bar Mitzvah, seating arrangements thereat, arangements for the liquor and the gift of an ice machine. These matters had to be a portion of the raw evidence then being considered by the State Grand Jury and released and given to the Supreme Court during the pendency of the Grand Jury proceedings by defendant Deputy Attorney General Joseph A. Hayden, Jr., who was conducting the Grand Jury investigation.

the Supreme Court chambers after plaintiff left and that Hayden had also preceded the plaintiff into the chambers.

Finally, his complaint alleges:

> 14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which court he has alleged has been involved in the prosecution of the charges against him.

At the injunction hearing Helfant presented the testimony of Patrick T. McGahn, one of his attorneys, and tes-

tified himself. Relevant testimony by Helfant is set forth in the margin.[3]

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[3] Q. What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A. Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

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Q. Were they sitting in their robes?

A. Yes, sir, I think they were; yes, sir.

Q. Now what happened when you came in?

A. I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

• • •

Q. And what was your state of mind and your feelings as you entered those Chambers?

A. Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q. Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A. The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q. Was there any other conversation?

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By oral opinion the district court denied preliminary injunctive relief on the ground that *Younger* v. *Harris, supra,* precluded federal intervention. It also dismissed

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A. Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q. What did you respond?

A. I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was suppose to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q. Now was there any file in the presence of the Chief Justice?

A. There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was

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the complaint for failure to state a claim for which relief can be granted. In the posture in which this case is before us, the district court has ruled only on the legal sufficiency of the complaint, pursuant to the Rule 12(b)(6) motion. "Findings of fact . . . are unnecesary on decisions of motions under . . . [Rule 12]. . . ." Rule 52(a), F.R. Civ. P. Although an evidentiary hearing on the injunction request was conducted, and the court made limited findings thereon, it did not find facts with respect to the merits of Helfant's § 1983 claim. Thus, there have been no fact-findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 225 (1973); *Haynes* v. *Washington,* 373 U.S. 503, 514 (1963).

"Since *Chambers* v. *Florida,* 309 U.S. 227, . . . [the Supreme] Court has recognized that coercion can be mental as well as physical. . . ." *Blackburn* v. *Alabama,* 361

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submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q. How long would you say you were totally, the total time you were before the Court?

A. It wasn't longer than ten of twelve minutes, Mr. Perskie.

Q. And when you came out—

A. Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q. And what did you tell him?

A. I said, Mr. Chief Justice, I am going to testify.

N.T. 22-26.

U.S. 199, 206 (1960). "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949). The decision must be freely as well as rationally made. *Blackburn* v. *Alabama, supra,* 361 U.S. at 208.

III.

Because we are reviewing a Rule 12(b)(6) dismissal order, we must take as true Helfant's allegations that his testimony before the grand jury was not the product of a free and unconstrained will and that he is about to be tried on an indictment containing charges emanating from that coerced testimony.

Younger v. *Harris, supra,* 401 U.S. at 53, holds that a federal court should not enjoin a pending state prosecution in the absence of a showing of bad faith, harassment or other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *See, Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971); *Conover* v. *Montemuro,* 477 F.2d 1073, 1080 (3d Cir. 1973). Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the predicate of *Younger* v. *Harris* is an assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Thus, invocation of the "extraordinary circumstances" exception must bring into play the suggestion of an inability of the state forum to afford an adequate remedy at law.

By his complaint, plaintiff alleges that he was coerced by members of the State Supreme Court into relinquishing his Fifth Amendment right not to testify before the grand jury. He asserts that he then did testify, and that, as a result, he was indicted because of his allegedly coerced testimony. Helfant also avers that a New Jersey trial court has declined his motions to dismiss indictments emanating therefrom, on the grounds that they were based on his coerced testimony. *See, e.g., United States* v. *Calandra,* — U.S. — (42 U.S.L.W. 4104, January 8, 1974).

Under the unusual circumstances of this case, can it be said that the appellant may not vindicate his constitutional rights by a defense in "a single criminal prosecution"? Otherwise stated, do the administrative powers of the New Jersey Supreme Court, in the factual complex giving rise to appellant's constitutional claims, threaten his opportunity for the vindication of his federal rights in the New Jersey state court system? Thus our analysis requires an examination of the "power parameters" of the New Jersey Supreme Court.

IV.

The New Jersey Constitution provides: "The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State." Article VI, § 7, Par. 1. "The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by Rules of the Supreme Court." Article VI, § 7, Par. 2.

"Thus this court is charged with responsibility for the overall performance of the judicial branch. Responsibility for a result implies power reasonably necessary to achieve it. More specifically, the power to make rules imports the power to enforce them." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961).

"The constitutional administrative power is absolute and unqualified, and our Supreme Court has characterized it as the "plenary responsibility for the administration of all courts in the State.' State v. De Stasio, 49 N.J. 247, 253, 229 A.2d 636, 639, cert. den. 389 U.S. 830, 88 S.Ct. 96, 19 L.Ed.2d 89 (1967). See in re Mattera, 34 N.J. 259, 271-272, 168 A.2d 38 (1961). See also N.J. Const., Art. XI, § IV, par. 5; *cf.* N.J. Const., Art. VI, § VII, par. 1. Additionally, compare Kagan v. Caroselli, 30 N.J. 371, 379, 153 A.2d 17, 21 (1959), wherein the court observed that '[t]he Constitution places the administrative control of the municipal court in the Supreme Court and the Chief Justice. Art. VI, § 2, par. 3; Art. VI, § 7, par. 1. There is no room for divided authority.'

"The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. Conceptually, such authority encompasses all facets of the internal management of our courts. *Cf. Mattera, supra,* 34 N.J. at 272, 168 A.2d 38. This was made clear by the Committee on the Judiciary which considered it a fundamental requirement that the courts be vested with 'exclusive authority over administration.' 2 Proceedings of the Constitutional Convention of 1947, at 1180, 1183." *Lichter* v. *County of Monmouth,* 114 N.J. Super., 276 A.2d 382, 385-386 (1971).

Thus, it becomes readily apparent that the Supreme Court of New Jersey is more than an appellate court. Its "constitutional administrative power is absolute and unqualified." The Chief Justice "may from time to time transfer Judges from one assignment to another." The Supreme Court may assign judges to the Appellate Division for terms fixed by its own rules. The Supreme Court is vested with formidable supervisory and administrative power extending not only to the trial court level but to the Appellate Division as well.

The posture of this case, requiring that we assume that the allegations charging coercion by the Supreme Court are true, the next question appears to be whether the appellant may vindicate his constitutional rights in this case in a state court system which functions under the "absolute and unqualified" administrative power of its highest court.

V.

Distilled to its essence, appellant's argument is that the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire state court system in processing his constitutional claim. But the schema of judicial review of federal constitutional questions presented in the state cases is not confined to the state court system. If convicted, and if persuaded that principles of federal constitutional law were not properly applied in the state system, Helfant will have the opportunity of applying for certiorari to the United States Supreme Court, 28 U.S.C. § 1257(3), and if given a custodial sentence, will have the additional right to apply to a

federal forum for federal habeas corpus relief, 28 U.S.C. § 2254.

What complicates this particular case, however, is that the resolution of Helfant's specific contention will not be confined to interpreting, refining, or defining principles of constitutional law. Critical to the eventual constitutional interpretations is the threshold determination of whether Helfant's testimony before the grand jury was the product of a free and unconstrained will. This is not a question of law. It is a question of fact—narrative or historical facts as to what occurred and operative or constitutional facts as to the voluntariness of his actions. *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 227. And some fact-finder must decide these.

We have not been directed to, nor has our research disclosed, any procedure by which this factual determination may be made by a jury. In New Jersey criminal law procedures, as is the case in federal practice, ultimate facts found by criminal court juries are merely verdicts of guilty or not guilty. The factual determination of the "free and unconstrained will" question within the state system will be made by a New Jersey state judge, a state judge subject to the "absolute and unqualified" administrative power of the Supreme Court, whose findings are presumably reviewable by an Appellate Division, assignment to which shall be by terms fixed by the rules of the Supreme Court, with a possibility of ultimate review by the New Jersey Supreme Court itself.[4] Thus, the New

[4] The New Jersey Supreme Court has set forth in detail the scope of appellate review of facts found by a trial judge: "There

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Jersey state court system would play an important role in both the fact-finding process and the review thereof, although upon acceptance of certiorari, "it is . . . [the U. S. Supreme Court's] duty . . . to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina,* 384 U. S. 737, 741-742 (1966).

A litigant has come into a federal court asking for a vindication of a federal constitutional right which is critically dependent upon a finding arising out of circumstances in which six or seven members of the New Jersey Supreme Court as then constituted are alleged to be directly involved. If denied federal relief, appellant will be restricted to a judicial procedure in which the resolution or modification of factual determinations would be com-

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can be no doubt of the *power* of the appellate tribunals of this State . . . to review the fact determinations of a trial court in all cases heard without a jury and to make new or amended findings. * * * The aim of . . . review . . . is . . . to determine whether the findings could reasonably have been reached on sufficient credible evidence present in the record. * * * But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *State* v. *Johnson,* 42 N.J. 146, 199 A.2d 809, 816-818 (1964). *See also, State* v. *Yough,* 49 N.J. 587, 231 A.2d 598, 602 (1967); *State* v. *Daly,* 126 N.J. Super. 313, 314 A.2d 371, 373 (1973). The Supreme Court, in reviewing the decision of the Appellate Division, may itself deem it appropriate to conduct a *de novo* review. *State* v. *Johnson, supra,* 199 A.2d at 818.

mitted to a court system under the administrative supervision of the participants in the factual complex. This presents an extremely awkward position.

VI.

To determine whether there should be an exercise of even limited federal judicial power under these circumstances requires a brief review of those fundamental principles which govern federal-state relations. Initially, the federal courts have subject matter jurisdiction of an action commenced by a person "[t]o redress the deprivation, under color of any State law . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ." 28 U.S.C. § 1343(3). Congress has afforded Helfant a remedy to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. And the Supreme Court has held that this may be by means of injunction, *Mitchum* v. *Foster,* 407 U.S. 225 (1972), or by declaratory judgment, *Steffel* v. *Thompson,* — U. S. — (42 U.S.L.W. 4357, March 19, 1974).

In the sensitive and delicate area of federal-state relations, where the power of government is divided between a federation and its member states, there is no constitutional barrier, and since *Mitchum* v. *Foster, supra,* no absolute Congressional barrier, to federal court intervention in state criminal proceedings.

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts

only in obedience to Congressional legislation in conformity to the judicial Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 162-163 (1943).

In *Stefanelli* v. *Minard,* 342 U.S. 117, 120 (1951), Mr. Justice Frankfurter emphasized that this policy of federal court restraint is based on "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. . . ." "Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute [Civil Rights Act] 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' *Screws* v. *United States,* 325 U.S. 91, 108." *Ibid.,* at 121.[5]

Mr. Justice Black would emphasize in *Younger* v. *Harris, supra,* 401 U.S. at 44: "This underlying reason for restraining courts of equity from interfering with criminal

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[5] "Mr. Justice Holmes dealt with this problem in a situation especially appealing: 'The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and intervene.' Memorandum of Mr. Justice Holmes in V. Sacco/Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516." *Ibid.,* 342 U.S. at 124-125.

prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Thus, federal judicial policy against intervention in state criminal proceedings is bottomed on an unwillingness for federal *disturbance* of "the notion of 'comity', that is, a proper respect for state functions," state institutions, and especially, state court systems. We now proceed to determine whether some minimum exercise of federal authority in these proceedings will *disturb* or whether it will *implement* this proper respect for state functions.

VII.

So posited, we reject appellant's basic contention that he is entitled to a federal order permanently enjoining the prosecution of the indictments. "[C]ourts of equity in the exercise of their discretionary powers should . . . [refuse] . . . to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds." *Douglas* v. *City of Jeannette, supra,* 319 U.S. at 163. In the context of permanently enjoining the state prosecution, we do not find bad faith or harassment, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), nor do we find this to be one of those "exceptional cases," *Douglas* v. *City of Jeannette, supra,* or "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Younger* v. *Harris, supra,* 401 U.S. at 53. We have not been persuaded that Helfant will be precluded from asserting constitutional rights in his defense of a single criminal proceeding. *Younger* v. *Harris, supra.*

We find no reason to depart from the formidable general policy of "leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this [Supreme] Court of any federal questions involved." *Douglas* v. *City of Jeannette, supra,* 319 U.S. at 163.

The considerations which militate against granting a permanent injunction against the conduct of the state trials do not surface, however, when considering the limited relief of a federal declaratory judgment as to whether Helfant's testimony before the grand jury was the product of his free and unconstrained will. If limited federal intervention is permitted, the state court system will ultimately be free to conduct the trials and appeals, if any, as an independent judiciary, free from any interference.

Since Helfant has a statutory right to have a claim for declaratory relief adjudicated in the federal courts, and will be denied the opportunity to be heard only if there is a threat to the delicate structure of comity between the federal and state systems, our next task is to examine the effect of limited federal fact-finding under these highly sensitive circumstances.

Judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove. Lord Herschel's remark to Sir George Jessel comes to mind: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."[6]

In the context of this highly unusual factual complex, it is critical that traditional respect for an outstanding state court system be nurtured, preserved, and supported; that the state court process this indictment without the

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[6] R. Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605, 606 (1908).

slightest suggestion that it is unable to perform its function without total objectivity, or that there be even the appearance of any infirmities. Federal court action which seeks to guarantee such an appearance and which bolsters and enhances the reputation of a state court system does not denigrate comity. Indeed, it supplies a positive affirmation of the high respect the court system of one sovereign extends to that of another. To order federal fact-finding within an extremely narrow compass, under these circumstances, comports with, rather than offends, the mutual relationship poignantly described by Justice Black as "Our Federalism."

Such limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the "brooding omnipresence" of the New Jersey Supreme Court. At the same time if the case proceeds to a state appellate level, judges of the reviewing courts will be able to adjudicate any federal constitutional questions with maximum freedom. Moreover, if the case should proceed to the New Jersey Supreme Court, that court will not be placed in an untenable situation of being a court of review as to findings of facts in which they are allegedly participants.

We are persuaded that there will be total "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris, supra,* 401 U.S. at 44.

Thus, by a federal resolution of this limited issue, the factual predicate of the appellant's federal claim will be resolved in the federal forum and, at the same time, the state will be completely free to proceed with the state prosecution and therein to vindicate appellant's constitutional rights.

Such limited declaratory relief does not have the force of an injunction, *Younger* v. *Harris,* or a declaratory judgment couched in such terms as would have "virtually the same practical impact as a formal injunction would." *Samuels* v. *Mackell,* 401 U.S. 66, 72 (1971). The use of the declaratory judgment here fits in precisely with the exception articulated by Mr. Justice Black in *Samuels* v. *Mackell,* 401 U.S. at 73: "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief."

We are quick to recognize that it may be contended that even such limited federal intervention in a state criminal proceeding would set an unwholesome precedent. Because of the high incidence of judicial fact-finding in pretrial hearings ancillary to state prosecutions, it can be envisioned that wholesale resort to this technique would be attempted. We are persuaded that any precedential value to our holding is miniscule. The factors which prompt our decision also limit its precedential value. First, perforce, the operative facts are limited to the State of New Jersey, where its constitution vests in the Chief

Justice and the state's highest court the total and complete administrative control over judges of the trial level and appellate division. Second, this case alleged involvement by the Supreme Court with a municipal court judge, who allegedly was the target of state grand jury proceedings and who was summoned to appear before the Supreme Court minutes prior to a scheduled grand jury appearance. Third, it is alleged that prior to such appearance before the state's highest court, Helfant had resolved to invoke the Fifth Amendment before the grand jury and that questioning by the Supreme Court appearance so unnerved him that he was unable to exercise a totally free will. Absent presence of these factors we see no future case receiving much precedential nourishment from the decision we reach today.[7]

Accordingly, the order dismissing the complaint will be reversed. The order denying the motion for a preliminary injunction will be vacated and the case will be remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court,[8] unless the State of New

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[7] There was some suggestion that this court should construe the New Jersey public employee immunity statute, N.J.S.A. 2A:81-17.2a2 in the context of Helfant's grand jury appearance. The litigants agree that this statute is not applicable since Helfant's presence before the grand jury was not associated with his role as a municipal court judge, but as a private attorney.

[8] "A court of the United States may . . . grant an injuction to stay proceedings in a State court . . . where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283.

Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith, and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court. The mandate of this court shall issue forthwith.

ADAMS, *Circuit Judge,* dissenting

The majority, while conceding that this case presents "a delicate question of federal-state comity," resolves that question by sanctioning federal interference in an ongoing state criminal proceeding. Warrant for this interference is purportedly found in the "extraordinary circumstances" exception to the anti-injunctive strictures of Younger v. Harris.[1] I conclude that this case, unusual as its facts may be, provides no occasion for casting aside the interwoven precepts of federalism and equitable jurisdiction that combine to make up the *Younger* doctrine of non-intrusion. Accordingly, I dissent.

The majority's exposition of the rule of *Younger* is fair: a federal court may not interfere in an ongoing state criminal proceeding[2] absent a showing of prosecutorial bad

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[1] The term "anti-injuctive" is, of course, shorthand for the notion that *any* federal interference in ongoing state criminal proceedings, be it by injunction, declaratory judgment, or otherwise, is to be disfavored. *See* Samuels v. Mackell, 402 U.S. 66 (1971).

[2] *Compare* Steffel v. Thompson, 14 Cr. L. Rep. 3123 (U.S., Mar. 19, 1974).

faith or harassment, or other "extraordinary circumstances." It is conceded that neither bad faith nor harassment are present in Helfant's prosecution.[3] Rather, the majority holds that the alleged involvement of the New Jersey Supreme Court in Helfant's prosecution embodies an "extraordinary" situation.

What the majority appears to overlook is that *Younger*, while setting out a nucleus of rules, did more. It expressed a spirit. Though some of the historical antecedents of the *Younger* decision undoubtedly extend further,[4] the first formal expression of the *Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued "to stay proceedings in any court of a state."[5] Two apparent motives behind the statutory inhibition of the 1793 Act were to prevent encroach-

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[3] "Bad faith" and "harassment" signify, generally, that a prosecution is being brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971).

[4] For example, the conflict between law and equity, particularly as embodied in the practice of equity of enjoining proceedings at law, extends back at least into the seventeenth century. *See* O. Fiss, Injunctions 12 (1972). Justice Frankfurther, speaking more particularly, stated "[t]he maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

[5] 1 Stat. 335, the forebearer of 28 U.S.C. § 2283. *See* Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. Chi. L. Rev. 471, 480 (1965). The statutory ban is today subject to several clearly delineated exceptions. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

ments by federal courts upon the then well-established state-court domain, and to codify the prevailing prejudices against extensions of equity jurisdiction and power.[6] One hundred and fifty years later the theme was repeated in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.[7] There the anti-injunction statute was viewed as necessary, in part, to prevent needless friction between state and federal courts."[8] And only this term the Supreme Court reiterated its sensitivity "to principles of equity, comity, and federalism."[9]

Of course, the Supreme Court has recently acknowledged that section 1983, under which Helfant's suit has been brought, is a specific exception to the absolute interdictions of the anti-injunction statute.[10] Nonetheless, section 2283 expresses a "long standing public policy"[11] against federal interference in state proceedings. The emanations from that policy must thus be heeded even in a 1983 suit.[11a] Accordingly, the same considerations that un-

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[6] *See* C. Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 131 (1941).

[7] 309 U.S. 4 (1940).

[8] *Id.* at 19.

[9] Steffel v. Thompson, *supra*.

[10] *See* Mitchum v. Foster, 407 U.S. 225 (1972).

[11] Younger v. Harris, 401 U.S. 37, 43, 46 (1971); Mitchum v. Foster, *supra*, 407 U.S. at 230.

[11a] *See* O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Mitchum v. Foster, *supra*, 407 U.S. at 243.

derlay the 1793 Act and its successors—a respect for state sovereignty and "basic doctrine[s] of equity" which "restrain . . . equity jurisdiction within narrow limits" [12]—have been imported into our civil rights jurisprudence.

The prime vehicle of this importation is Younger v. Harris.[13] Supplemented by Samuels v. Mackell, *supra,* the *Younger* doctrine makes it clear that *only* prosecutorial bad faith or harassment, or "perhaps other extraordinary circumstances" [14] will justify federal intrusion, by way of injunction, declaratory relief or, as here, "federal fact-finding," into a state criminal proceeding. The doctrine is not hortatory. Given the policies incarnate in the *Younger* rule, it would appear that we should sanction interference under the "extraordinary circumstances" exception only when absolutely satisfied that neither "comity" nor equitable principles of restraint will suffer. Analysis of Helfant's situation leaves me far from satisfied that such is the case here.

A. "Comity"

The concept of comity, though often invoked, tends to elude precise definition. Webster's dictionary offers a

[12] Younger v. Harris, *supra,* 401 U.S. at 43, 44.

[13] It must be noted that the Supreme Court, in *Younger,* emphasized that the anti-intrusive spirit adumbrated there was not a departure from the Court's prior decisions. *See,* e.g., Fenner v. Boykin, 271 U.S. 240 (1926); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[14] Perez v. Ledesma, 401 U.S. 82, 85 (1971).

generic meaning—"mutual consideration between . . . equals." In the context of federal-state judicial relations, the meaning is more sharply etched. "Comity" is

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." [15]

Among the "state functions" of which a federal court should be particularly respectful is the administration of state criminal justice.[16] The recognition that administration of the criminal law is "intimately involved with sovereign prerogative" [17] should result in an extreme diffidence on the part of a federal court asked to intrude into the state criminal process. Diffidence may be dispelled where, as in cases of "bad faith" or "harassment," the criminal law is being utilized for other than its ordinary, legitimate purpose, or where the state is acting in flagrant disregard of the orderly processes of criminal justice. But when, as here, a criminal prosecution has been brought with the hope of obtaining a valid conviction,

[15] Younger v. Harris, *supra,* 401 U.S. at 44.

[16] *See* Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction,* 1973 Ariz. St. U.L.J. 557, 572 (1973).

[17] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

"comity" dictates that the federal courts indulge every presumption in favor of the state court's impartiality, orderliness and competence to decide federal questions.

While avowing its recognition of this notion of respect for state functions, the majority concludes that the presumption in favor of the state criminal justice system is punctured and deflated by the circumstances of this case. The majority's view distills to this: because the New Jersey Supreme Court exercises rather plenary "administrative power" over the lower state courts, and because certain of the Justices of the New Jersey Supreme Court itself were the alleged instrument of Helfant's "coercion," there is likelihood of partiality on the part of the state trial court that would, ordinarily, resolve the factual questions embodied in Helfant's Fifth Amendment claim.[18]

The erection and entertainment by this Court of the foregoing scenario, and its use as a justification for interfering in a state criminal proceeding, appears to me to be squarely in the teeth of the spirit of comity expressed in *Younger*. The scenario presumes for example, that the state trial judges act with a constant eye on the New Jersey Supreme Court, seeking not to apply the law fairly but to preserve or advance their own interests by a devious, obsequious scyophancy. It seems to postulate, further, that the New Jersey Supreme Court itself might be so venal and vindictive as to mete out some administrative

[18] Of the Justices that were on the New Jersey State Supreme Court at the time of the incident referred to in Helfant's complaint, only four remain as members of the Court, and more specifically the Chief Justice, who exercises the administrative supervision referred to in the majority opinion, has since retired.

"punishment" in the event that a trial court determined that Helfant had been "coerced." Finally, the majority's view overlooks what is the case in the federal system as well as in the states—that courts are sometimes asked to resolve controversies in which a party holds some power to affect adversely the very judges who are deciding the dispute.[19] In such instances, there is not imputed to the federal courts a hint of partiality. "Mutual respect among equals"—the generic definition of "comity"—would seem to demand, then, that no such imputation be made concerning the state courts either.

The majority, perhaps in recognition of the harsh light in which their decision might seem to cast the New Jersey courts, try to meliorate the implications of their opinion by speaking in terms of the mere "appearance" of a less than impartial state court process.

In sum, the majority's assertion that the possible "appearance of a biased [state] decision" warrants federal intrusion smacks of the federal high-handedness that section 2283 and *Younger* were fashioned to prevent. In my view, the spirit of comity, properly conceived and applied, would

[19] To cite an obvious example, federal courts quite often assess the constitutional validity of Congressional legislation. Congressmen, of course, may grant or withhold a salary increase to federal judges at any time. There thus exists something of an economic motivation for a federal judge to be less than impartial in reviewing federal legislation. Yet I do not think the probity of a federal court decision may be properly questioned on such basis.

be reason enough to reject Helfant's plea for federal relief at this stage of the controversy.[20]

B. "Great and Immediate" Harm

A crucial aspect of *Younger's* limitation upon incursions into state proceedings is the concept that federal interference may be sanctioned, if at all, only when the alleged unconstitutional harm will be "both great and immediate."[21] This teaching has its genealogy in traditional precepts of equitable restraint.[22] A consideration of the facts of the present dispute shows that, even were

[20] Only recently, a three-judge federal district court sitting in New Jersey rejected the notion that the New Jersey state courts are incapable of fairly adjudicating issues implicating their own state Supreme Court. In American Trial Lawyers Ass'n. v. New Jersey Supreme Court, No. 64-72 (D. N.J., June 20, 1972), where there was attacked by a bar association a rule promulgated by the Supreme Court setting forth the ground rules for contingent fees, the district court in rejecting the complaint stated:

> "Rather [plaintiffs] emphasize that by leaving [their claims] to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the State Supreme Court."

[21] Younger v. Harris, *supra*, 401 U.S. at 46; Fenner v. Boykin, *supra*, 271 U.S. at 243.

[22] Fletcher v. Bealey, 28 Ch. 688 (1885). *See* Story, Equity Jurisprudence 377 (1919).

it the case that Helfant had been "coerced" into testifying, any harm resulting from that coercion would not be "immediate"—a *sine qua non* of federal relief.

The majority, having correctly determined that there is no basis in law for an outright injunction against Helfant's prosecution, concludes that if the facts are as Helfant alleges, declaratory relief should issue to the effect that the "coerced" testimony may not be introduced at Helfant's trial. The edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the state will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing. At oral argument, counsel for the state represented to this Court that Helfant's grand jury testimony will be used, if ever, *only* to impeach any inconsistent statements Helfant might utter should he take the witness stand.[23] The

[23] The colloquy at oral argument between the Court and counsel for New Jersey was as follows:

> Judge Aldisert: Is the state representing to this federal court that it does not intend to and will not use the testimony elicited from the plaintiff at the grand jury proceeding?
>
> A. At this time there is no present intention of using that testimony. But were the appellant to take the stand, were his testimony to deviate in strong terms, that testimony then, of course, under Harris v. New York, might well be . . . .
>
> Judge Aldisert: . . . [N]ow we do not have as strong a position that I thought we had a minute ago.
>
> • • •

(Footnote continued on following page)

"harm" that the majority's decision seeks to avert is thus conjectural, depending for its very existence upon events that may never occur. Consequently, the majority's result tends to ignore or flout the "great and immediate" requirement.

Another point should be mentioned briefly here. Helfant was indicted for three "substantive" offenses,[24] as well as for false swearing before the grand jury. Insofar as the false swearing counts are concerned, it would appear that Helfant's grand jury testimony will be admissible in evidence in any event, even if it should be determined that that testimony was "coerced." The Supreme Court, and this Court as well, have held that the Fifth Amendment does not confer upon a witness the privilege to lie while under oath.[25] Thus, though "coerced" testi-

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(Footnote continued from preceding page)

JUDGE ALDISERT: The question now comes if the plaintiff is not entitled to federal court protection of an asserted constitutional right at this time, at what time could he possibly have federal protection if an issue at stake is the possible bias of a state court system?

A. Were the state to seek to introduce the grand jury testimony as a declaration against penal interests, for the purpose of argument, perhaps the appellant might have standing to come into this Court.

[24] The three "substantive" state offenses with which Helfant is charged are conspiracy, obstructing justice, and aiding in the compounding of a crime.

[25] *See* United States v. Knox, 396 U.S. 77 (1969); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). *See also* United States ex rel. Annuziato v. Deegan, 440 F.2d 304 (2d Cir. 1971).

mony may not be used to establish Helfant's commission of "substantive" offenses, it would appear that the state may use it to prove that he swore falsely.

The majority's disregard of the "great and immediate" limitation thus emerges in sharp focus. There is no reasonable assurance that Helfant's grand jury utterances will *ever* be introduced at trial of the substantive counts, and there is a positive indication that Helfant can suffer no unconstitutional harm at all by introduction of his testimony at trial of the false swearing counts. The equitable doctrine that harm must be imminent before an injunction will issue against a state criminal proceeding—a precept whose substance is an integral part of the doctrine of federal non-intrusion—is, therefore, disregarded by the result the majority reaches.[25a]

C. "Irreparable Injury" and "Adequate Remedy at Law"

Among the central limiting principles of equity jurisprudence is the maxim that equity will act only when there is no adequate remedy at law.[26] This notion, too, has its roots in the historical bifurcation—and the resultant conflict—between courts of law and of equity.[27] The requirement that a plaintiff show "irreparable injury" before an injunction will issue is but an alternative statement of the "adequate remedy" rule.

Younger emphasizes that the "adequate remedy" rule is to be given rigorous application when a federal court is

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[25a] *See* O'Shea v. Littleton, *supra*, 414 U.S. at 498.

[26] O. Fiss, Injunctions 9 (1973).

[27] *Id.* at 12. *Cf.* Story, Equity Jurisprudence 375-80 (1919).

asked to interfere in an ongoing state criminal proceeding. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial:

> "Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves, be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."[28]

Even prior to *Younger*, the Supreme Court had explained in forceful language, why challenges to certain types of unconstitutionality would not ordinarily support federal interruption of a state criminal trial. First, the state criminal process is presumed to be an "adequate" channel for vindicating federal rights. Second, if federal relief were granted in the midst of a state criminal proceeding,

> "[e]very question of procedural due process of law —with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum . . . to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities . . . to subvert the orderly, effective prosecution of local crime in local courts."[29]

[28] Younger v. Harris, *supra*, 401 U.S. at 46; *see also* Watson v. Buck, 313 U.S. 387, 400 (1941).

This exposition by the Supreme Court of the underpinnings of the adequate remedy doctrine makes plain that, besides honoring tenets of equitable restraint, the adequate remedy rule advances and protects the concept of federal-state comity. The requirement that there be no adequate remedy at law is thus strengthened by *Younger's* explicit and implicit re-invigoration of "a proper respect for state functions."[30]

The sanctioning of federal relief at this stage of Helfant's prosecution practically undermines the "adequate remedy" precept. What Helfant seeks, and what the majority would permit, is a federal declaration in the middle of a state criminal trial to the effect that certain evidence was unconstitutionally obtained, and so is inadmissible in the state court. To my mind, this situation so

[29] Stefanelli v. Minard, 342 U.S. 117, 123-24 (1951) (footnotes omitted); *see also* Clearly v. Bolger, 371 U.S. 392, 397 (1963).

[30] 401 U.S. at 44. It is significant to note that Justice Brennan, writing for the majority in Dombrowski v. Pfister, *supra*, 385 U.S. at 485 n.3, adverted to a situation closely analogous to that presented in this case. He said:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

closely resembles that adverted to in *Stefanelli, supra,* that there is little justification for denominating this an "extraordinary situation" and shelving the restraints on our remedial powers. A criminal prosecution, followed by appeal and petition for certiorari, is presumed to be an adequate remedy for the constitutional deficiencies Helfant alleges. The "inadequacy" the majority perceives is, of course, the asserted involvement of the New Jersey Supreme Court. However, as we have seen, that very claim of "inadequacy" is itself in derogation of the program of comity.

Moreover, there is an alternative federal remedy available to Helfant if the need for it should ever arise, a remedy which would provide an opportunity for the sort of "federal fact finding" adverted to by the majority. Yet, this alternative remedy—habeas corpus—would not cause so severe a wrench to federal-state relations as the one advanced by the majority. Should Helfant lose his Fifth Amendment claims in the state courts and receive a custodial sentence,[31] he may seek a writ of habeas corpus. The habeas statute would appear to require full federal fact finding on Helfant's "coercion" claim,[32] given the circumstances Helfant alleges.

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[31] *See* 28 U.S.C. § 2254; United States ex rel. Dessus v. Pennsylvania, 452 F.2d 557 (3d Cir. 1971), *cert. denied,* 409 U.S. 854 (1972).

[32] 28 U.S.C. § 2254(d) provides in part that in federal district courts, upon an application for *habeas,* prior state-court findings of fact "shall be presumed to be correct" unless:

(Footnote continued on following page)

Again, the dominant chord of *Younger,* requiring as it does that we pay scrupulous heed to the adequacy of state remedies and alternative federal remedies, appears to have been abridged by the majority's decision. And certainly, when the "adequate remedy" rule, the requirement of "great and immediate" harm, and the cardinal principle of comity are considered together, the sanctioning of federal interference in this case cannot be justified.

D. "Extraordinary Circumstances"

The assumption that there exists an "extraordinary circumstance" exception to *Younger's* interdiction is grounded in the language of the *Younger* opinion itself. There, the Supreme Court said:

> "There *may,* of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."[33]

(Footnote continued from preceding page)

"(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or

"(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or

"(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

[33] 401 U.S. at 53 (emphasis added).

But the Court immediately proceeded to point to an illustration of what such circumstances might be, quoting from Watson v. Buck:[34]

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[35]

No other delineation of the contours of the "extraordinary circumstances" exception has yet been undertaken by the Supreme Court. Indeed, scattered statements by the Court seem to indicate doubt on the part of some of the Justices that any such exception exists at all. Thus in Perez v. Ledesma,[36] for example, decided on the same day as *Younger*, Justice Black was willing to say only that "*perhaps* in . . . extraordinary circumstances where irreparable injury can be shown is federal . . . relief against pending state prosecutions appropriate."[37] And only recently, in *Allee* v. *Medrano*,[38] Chief Justice Burger, joined by two other members of the Court, offered a reading of *Younger* that seems to leave no room for any extraordinary circumstances exception:

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[34] 313 U.S. 387 (1941).

[35] *Id.* at 402.

[36] 401 U.S. 82 (1971).

[37] *Id.* at 85.

[38] — U.S. — (May 20, 1974).

> "To meet the Younger test the federal plaintiff *must* show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts."[39]

While it cannot be said that these statements affirmatively establish that there is no "extraordinary circumstances" exception, they do indicate that uncertainty exists concerning what circumstances, if any, will warrant federal intrusion under that circumscribed exception. Absent a clear benchmark to guide us in identifying "extraordinary circumstances," we should hew closely to the concepts of equitable restraint and comity, concepts which, after all, *Younger* was designed to preserve, protect and perpetuate.

E. Practical Considerations

Thus far, I have sought to point out how historical and doctrinal considerations weigh against a federal incursion into the midst of Helfant's state prosecution. But more is called for in this case than "a merely doctrinaire alertness to protect the proper sphere of the states in enforcing their criminal law."[40] A glance of pragmatics and at the realities of time and cost emphasize how damaging to federal-state relations the majority's decision may prove.

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[39] Slip opinion at 16 (Burger, C.J., concurring and dissenting).

[40] Stefanelli v. Minard, *supra*, 342 U.S. at 123.

Helfant was first subpoenaed to appear before the state grand jury in October of 1972. On January 17, 1973, an indictment was returned, charging Helfant with the commission of crimes that occurred as early as 1968. It has now been more than a year-and-a-half since New Jersey has been thwarted from proceeding with the prosecution because of the federal intervention sought by Helfant. During that time, a critical witness has died and the administration of the prosecutor's office has changed. The prospect now is for further delay, since "fact finding" has been ordered in the district court, and because there is the possibility of another appeal to this Court from the fact finding proceeding. It is, therefore, not unlikely that a two-year suspension in the state prosecution will result. A delay of such duration in a state criminal proceeding, sanctioned by a federal court, and predicated solely on a challenge to the admissibility of evidence—evidence that may never be offered—would certainly seem to be an "insupportable disruption."[41] This is particularly true in these times when special efforts are being made to expedite criminal proceedings.[42]

Looming large among the doctrinal premises of Younger, of section 2283, and of the recent proliferation of commentary justifiably decrying the "denigration of state courts,"[43] is the idea that, for our federal system to function as it ought, the states must be accorded a full measure of dignity, respect and confidence. When a federal court, on the occasion of a criminal defendant's objection to evidence, imposes a substantial impediment upon a state criminal trial, little is done to enhance the prestige of either court, state or federal.

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[41] *Id.*

[42] *See, e.g.*, Rule 50(b), Federal Rules of Criminal Procedure; ABA Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968).

[43] Aldisert, *supra*, at 573.

What is at stake in this case is the need to strike a balance between the regimen of non-intrusion on the one hand, and a citizen's right to federal disposition of his federal claims on the other. The two are not irreconcilable. Helfant, under the view expressed in this dissent, could have his day in federal court by certiorari or by habeas. And, of course, by declining to permit federal interference now we would save to the state its sovereign prerogative to try an accused without delay. The majority's solution of the problem, however, disrupts and disdains the state process for no other reason than to assure Helfant of an *immediate* federal forum for a factual claim that may never ripen into controversy. Comity thus suffers, not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*.

For all of the reasons set forth, I dissent, and would affirm the judgment of the district court.

Judges Van Dusen and Weis join in this dissenting opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

EDWIN H. HELFANT

Appellant

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and the STATE OF NEW JERSEY

(D. C. Civil Action No. 607-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

Certified Judgment in Lieu of Mandate, dated July 8, 1974

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed May 9, 1973, which dismissed the complaint be, and the same is hereby reversed. The order entered May 9, 1973, denying the motion for a preliminary injunction is vacated and the cause is remanded to the district court for the entry of an order temporarily enjoining the trial of Indictment No. SGJ-10-72-10 in the New Jersey courts until completion of the proceeding in the district court, unless the State of New Jersey stipulates to a postponement thereof. The district court proceeding shall be limited to a determination of whether Helfant's testimony before the state grand jury on November 8, 1972, was the product of a free and unconstrained will. It shall issue a declaratory judgment setting forth its conclusions. We direct that the trial be commenced forthwith and that the district court shall make findings of fact and conclusions of law within thirty days from the issuance of the mandate of this court.

ATTEST:

THOMAS F. QUINN
Clerk

July 8, 1974

Certified as a true copy and issued in lieu of a formal mandate on July 8, 1974.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Copy

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate dated July 23, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1386

EDWIN H. HELFANT,

Appellant,

vs.

GEORGE F. KUGLER, Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY

(D. C. Civil Action No. 670-73)

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Upon consideration of appellees' motion to Recall Judgment in Lieu of Formal mandate, and for certain other relief, and brief in support thereof, and appellant's brief in opposition thereto, all in the above entitled case,

Order Recalling Certified Judgment in Lieu of Mandate and Staying Issuance of Mandate dated July 23, 1974

By direction of the Court, it is ORDERED that this Court's certified judgment, issued in lieu of formal mandate on July 8, 1974, be, and hereby is recalled; and

It is Further Ordered that the issuance of the certified judgment in lieu of formal mandate be, and hereby is stayed until August 7, 1974.

For the Court,

THOMAS F. QUINN
Clerk

Dated: July 23, 1974

Letter dated October 31, 1972, to John F. Callinan from Patrick T. McGahn, Jr.

John F. Callinan, Esq.
3311 New Jersey Avenue
Wildwood, New Jersey

Re: In the Matter of Edwin Helfant
Our File No. 2751

Dear John:

In the absence of Marvin, I want to tell you that Ed Helfant has been subpoenaed once again before the New Jersey State-wide Grand Jury on November 8th. It is his intention to take the Fifth Amendment.

As you know, we were up there once before and I enclose herewith a copy of that transcript in which he was compelled to go before the Grand Jury and take the Fifth. My position was that he should not have to go before the Grand Jury when he is the target of the investigation. I am having Jerry Gross check the law on the subject and I would like you to do likewise. A starting point, I beleive, is State v. C. Robert Sarcone, 93 N.J. super 501.

I would appreciate it likewise if you would have one of your fellows prepare a memorandum on this subject because time is of the essence and no doubt we will wind up again before Judge Kingfield.

Yours cordially,

/s/ Patrick T. McGahn, Jr.
For McGahn & Friss.

Affidavit of Samuel Moore

State of New Jersey,
County of Atlantic, } ss.:

Samuel Moore, of full age, duly sworn upon my oath according to law, depose and say:

1. Some time in August of 1972, while in my office at 533 Guarantee Trust Building, Atlantic City, New Jersey, I received a visit from William P. Sullivan, of the New Jersey State Police. He said, "This investigation does not concern you, this concerns Helfant." A brief discussion ensued concerning the Cantoni case, then he left.

2. About a week later, Detective Sullivan returned to my office and gave me a subpoena for the following Wednesday to appear before the State Grand Jury in Trenton. The following Wednesday I went to Trenton at the scheduled time of 1:00 p.m., and sat in the corridor until 5:00 p.m., and the Grand Jury was excused without my ever having been called before them. Detective Sullivan then called me into a room adjoining the Grand Jury room, and I met Deputy Attorney General Hayden for the first time. There were three other people in the room, whose identities were unknown to me.

3. Hayden then asked me what I knew about Helfant's involvement in the Cantoni matter. I replied I did not know anything about the Cantoni matter. Hayden then requested me to tell him anything I knew about Helfant. I told him I knew nothing about Helfant of my own knowledge. I was excused after three-quarters of an hour, without ever having been before the Grand Jury, even though my subpoena was to appear before the Grand Jury.

4. I was subsequently served with another subpoena to appear before the Grand Jury by Detective Sullivan, and proceeded to Trenton on the following Wednesday, and arrived at the designated time, which I think was 11:00 a.m. I waited in the corridor for over five hours, without ever being called before the Grand Jury on this occasion. The Grand Jury was dismissed, and Sullivan once again requested I come into the anteroom. I am sure that the same unidentified people were there with Mr. Hayden. Hayden once again began to question me about Helfant, and what I could tell him about Helfant. I told Mr. Hayden what I told him on the previous occasion, that I knew nothing about Helfant. I asked him if he wanted me to lie and make up some stories about Helfant, and he said, "No, we just want to know about Helfant," and he went into the Cantoni matter again. Mr. Hayden refused to believe anything I said, and I said to him, "You don't want to believe me—you would rather take the word of a drug pusher who is in State Prison." I was once again dismissed without ever being brought before the Grand Jury.

5. I received a third subpoena from Detective Sullivan, and I told him I had a vacation planned, and would not appear the following Wednesday, as I was leaving for a vacation on Monday. Due to my failure to appear, a warrant had been issued for my arrest, and upon my return I had to appear in Trenton on October 25, 1972 before Superior Court Judge Kingfield. While sitting in Judge Kingfield's waiting room for one-half hour with my attorney, L. Milton Freed, of Atlantic City, Deputy Attorney General Hayden and Detective Sullivan came out of Judge Kingfield's chambers just before Judge Kingfield came out to ascend the bench. They were in there at least one-half

hour, as I was sitting there for that period of time. My attorney asked if this matter could be heard in chambers, and Hayden insisted that it be heard in open Court. Judge Kingfield then ascended the bench, and Mr. Hayden requested that I be incarcerated. The Judge then sentenced me to one day in jail and fined me $100.00. My attorney informed the Court that I was to appear in front of the Grand Jury. Judge Kingfield then released me in the custody of my attorney for the purpose of appearing before the Grand Jury. I testified in front of the Grand Jury and then Detective Sullivan took me to the Mercer County Jail, where I was confined until 4:00 p.m.

6. On November 6, 1972, I received a call from the Administrative Director of the Courts, who told me that the Supreme Court wanted to see me at 9:50 a.m. on November 8th. I proceeded to Trenton and arrived there late due to the inclement weather, and went right before the Supreme Court in chambers. The first quection from Chief Justice Weintraub was whether I had called Detective Sullivan a "prick." This was a question that was asked in the Grand Jury session of October 25th. I had brought my file with me and had all the papers in front of me, not knowing what the Supreme Court was going to ask, as Mr. McConnell did not tell me what the Supreme Court wanted, but I assumed it was about the Cantoni matter. The Chief Justice then asked if I had a copy of the Cantoni Complaint with me, and when I told him I did, he asked me if he could have same. Helfant's signature was discussed.

7. Then there was some discussion about the $1500.00 check which had been located in Feinberg's office, and the Chief asked me what kind of office Feinberg had, and

Affidavit of Samuel Moore

I told him it had a fine reputation. I then stated to the Chief Justice that Sullivan should have told me he found the $1500.00 check in Feinberg's office, and the Chief said Sullivan is under no obligation to tell me anything about an official investigation. I was then excused by the Court.

(s) SAMUEL MOORE

NOTARIZED

FILED
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

This is an appeal from a judgment of the Court of Appeals for the Third Circuit sitting *en banc* entered on July 8, 1974. The judgment reversed the order of the District Court for the District of New Jersey which dis-

missed respondent's complaint and denied his application for a preliminary injunction. The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to conduct an evidentiary hearing and set forth its conclusions in the form of a declaratory judgment.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit sitting *en banc* has been reported and appears in the Appendix (A123). *Helfant* v. *Kugler,* 500 F.2d 1188 (3 Cir. 1974). The prior opinion of a three judge panel of the Court of Appeals for the Third Circuit has been published and appears in the Appendix (A102). *Helfant* v. *Kugler,* 494 F.2d 1299 (3 Cir. 1973). The oral opinion of the District Court for the District of New Jersey dismissing respondent's complaint and denying preliminary injunctive relief also appears in the Appendix (A97).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. A three judge panel of the Court of Appeals for the Third Circuit thereafter reversed the District Court's order on September 10, 1973. On September 21, 1973, the Court of Appeals granted petitioners' application for a rehearing. Subsequently, the Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at petitioners' request, consented to a consideration of the matter *en banc.*

The judgment in lieu of a formal mandate was issued by the Court of Appeals for the Third Circuit *en banc* on July 8, 1974. Petitioners' application for a recall of the mandate was granted on July 23, 1974. Issuance of the mandate was stayed until August 7, 1974 to permit petitioners to file a petition for a writ of certiorari. Following petitioners' application, respondents filed a cross-petition. This Court granted the petition and cross-petition on November 18, 1974.

Questions Presented

1. Whether the "extraordinary circumstances" exception to the *Younger* v. *Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution in the absence of an allegation of "harassment" or "bad faith"?

2. Whether the New Jersey Supreme Court's inquiry into respondent's intention to continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities constituted such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution?

3. Whether federal intervention in a pending state criminal prosecution was permissible where the courts of the State of New Jersey were fully capable of fairly adjudicating respondent's constitutional claims?

4. Whether the Fifth Amendment privilege against self-incrimination is violated where lawful governmental processes have the unintended effect of overbearing an individual's will and causing him to testify?

5. Whether federal intervention was permissible to enjoin a pending state criminal prosecution on charges of

false swearing on the ground that allegedly compelled testimony formed the basis for the criminal prosecution?

6. Whether federal intervention in pending state criminal prosecution was permissible to resolve factual disputes in advance of constitutional necessity in the absence of an allegation of great, immediate and irreparable injury?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution . . . ."

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Constitution of the United States, Amendment XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 1:

> "The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior service, as provided by rules of the Supreme Court. In case the Chief Justice is absent or unable to serve the presiding Justice designated in accordance with rules of the Supreme Court shall serve temporarily in his stead."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 2:

> "The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 3:

> "The Supreme Court shall makes rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1 Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

> "2A:1B-3. Institution of removal proceedings
>
> A proceeding for removal may be instituted by either house of the Legislature acting by a majority

of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5.

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6.

"2A:1B-6. Preparation of defenses; counsel, production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7.

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting en banc, or before three justices or

judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2A:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9.

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10.

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant

to Article VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

N.J.S.A. 2A:131-4:

"2A:131-4. False swearing; offense stated.

Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable for a misdemeanor."

New Jersey Rules of Evidence, Rule 8(3):

"In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. . . ."

New Jersey Rules of Evidence, Rule 63(10):

"A statement is admissible if at the time it was made it was so far contrary to the defendant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution."

New Jersey Court Rules, R. 1:12-1:

"*Rule* 1:12. Disqualification and Disability of Judges

1:12-1. Cause for Disqualification; On the Court's Motion

The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he

(a) is by blood or marriage the second cousin of or is more closely related to any party to the action;

(b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, or office associates of any such attorney except where the Chief Justice for good cause otherwise permits,

(c) has been attorney of record or counsel in the action; or

(d) has given his opinion upon a matter in question in the action; or

(e) is interested in the event of the action; or

(f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein, or be-

cause the board of chosen freeholders of a county or the municipality in which he is a resident or liable to be taxed are or may be parties to the record or otherwise interested."

New Jersey Court Rules, R. 1:12-2:

"1:12-2. Disqualification on Party's Motion

Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

New Jersey Rules of Court, R. 1:12-3:

"1:12-3. Proceedings in the Trial Courts in the Event of Disqualification or Inability

(a) Before or After Trial; Designation. In the event of the disqualification or inability for any reason of a judge to hear any pending matter before or after trial, another judge of the court in which the matter is pending or a judge temporarily assigned to hear the matter shall be designated by the Chief Justice or by the Assignment Judge of the county where the matter is pending except that in the municipal court, the disqualified or disabled judge shall himself in writing designate the acting judge, subject to the Assignment Judge's approval, if the designee is not himself a judge of a municipal court.

(b) During Trial. If a judge is prevented during a trial from continuing to preside therein, another judge may be designated, as provided in paragraph (a), to complete the trial as if he had presided from its commencement, provided, however, that he is

able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof.

(c) Disposition in the Interest of Justice. No substituted judge shall continue the trial in any matter pursuant to this rule unless he is satisfied, under the circumstances, that he can fairly discharge his duties, and if not so satisfied, he shall make such disposition as the circumstances warrant, as where trial has taken place, by ordering a new trial or, in a case tried without a jury, by directing the recall of any witness.

Statement of the Case

This is an appeal from a decision rendered by the Court of Appeals for the Third Circuit sitting *en banc* reversing an order of the United States District Court dismissing respondent's complaint and denying his application for preliminary injunctive relief. Three judges dissented. The judgment issued in lieu of a formal mandate was recalled and stay pending certiorari proceedings. This court granted petitioners' application for a writ of certiorari and respondent's cross-petition on November 18, 1974.

The material facts are not in dispute and are essentially a matter of official record. Respondent Helfant, a member of the New Jersey Bar and a former municipal court judge,[1] alleged in a verified complaint (see 18 U.S.C. §1343

[1] In New Jersey, municipal court judges may practice law and need not devote their full time to their official duties. See N.J.S.A. 2A:8-8 and R. 1:15-1(c). However, they may not practice in any "criminal, quasi-criminal or penal matter." R. 1:14-1(c).

(3) and 42 U.S.C. §1983) that he was subpoenaed to appear before the State Grand Jury on October 18, 1972 (A61). The subject under investigation by the grand jury concerned a criminal complaint for atrocious assault and battery upon two victims lodged in a municipal court in which Judge Samuel Moore presided (A61). Respondent allegedly represented one of the victims and caused the complaint to be filed against one John Cantoni for the purpose of extracting money from him. The charge of atrocious assault and battery being an indictable offense,[2] the municipal court had no jurisdiction to hear the matter,[3] and could dismiss the complaint only with the consent of the County Prosecutor (A24). Nevertheless, the complaint was dismissed without the Prosecutor's knowledge, after Cantoni paid an intermediary $1,500, plus an additional $200 allegedly for Judge Moore (A21).

Pursuant to the subpoena, respondent appeared before the State Grand Jury on October 18, 1972, and was advised that he was the target of an investigation (A61).[4] Armed

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[2] N.J.S.A. 2A:90-1.

[3] In New Jersey, municipal court judges have jurisdiction to conduct probable cause hearings. If probable cause is found to exist, the defendant is "bound over" to await final determination of the cause. R. 3:4-3.

[4] Unlike many jurisdictions, New Jersey case law provides that a witness who is a target of a grand jury inquiry must be apprised of that fact. See, *e.g., In re Addonizio*, 53 N.J. 107, 117, 248 A.2d 531, 536 (1968); *In re Boiardo*, 34 N.J. 599, 604-06, 107 A.2d 816, 818-20 (1961); *State* v. *DeCola*, 33 N.J. 335, 350-52, 164 A.2d 729, 736-37 (1960). When a witness is thus a target, no more need appear to support his Fifth Amendment claim. *In re Addonizio, supra*, at 117, 248 A.2d at 536; *State* v. *Fary*, 19 N.J. 431, 438-39, 117 A.2d 499, 503-04 (1955).

with that information and pursuant to his attorney's advice, respondent invoked his Fifth Amendment privilege against self-incrimination and refused to testify (A61). Nevertheless, respondent Helfant's appearance before the grand jury and his possible involvement in the pending investigation eventually reached the attention of the New Jersey Supreme Court. Upon receiving notice, the Administrative Director of the Courts, in accordance with settled practice, informed the members of the Supreme Court. The Administrative Director was then instructed to obtain a report from the Deputy Attorney General handling the matter and all relevant grand jury testimony.[5] The material was obtained and revealed in substance, the allegations against Judge Helfant and Judge Moore recounted above.[6]

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[5] Under New Jersey law, grand jury minutes are in the exclusive custody of the judiciary. See, *e.g., In re Jeck*, 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953).

[6] These facts were set forth in our petition for a writ of certiorari (P12-13). In his cross-petition, respondent argued that this material was *dehors* the record (C.P.18, fn. 4). He subsequently moved to dismiss our petition. This Court denied respondent's motion on the same day that it granted the petition and cross-petition for a writ of certiorari. We contend that these facts, which are contained in the official records of the Administrative Office of the Courts, may be judicially noted. See, *e.g., Fletcher* v. *Norfolk Newspapers*, 239 F.2d 169 (4 Cir. 1956). *Cf. Market St. Ry. Co.* v. *Railroad Comm'n*, 324 U.S. 548 (1945); *Gomez* v. *Wilson*, 477 F.2d 911 (D.C.Cir. 1973); *United States* v. *Meyer*, 462 F.2d. 822 (D.C.Cir. 1972); *Paul* v. *Dade Co. Florida*, 419 F.2d. (5 Cir. 1969); *Wagner* v. *Fawcett Publications*, 307 F.2d. 409 (7 Cir. 1962). See also Rule 201, *Proposed Rules of Evidence for United States Courts and Magistrates*. In any event, respondent in his cross-petition expressly alluded to the

(Footnote continued on following page)

In the meantime, it had become apparent that the grand jury's investigation encompassed other matters in which respondent was involved (A63). Shortly after his initial appearance, respondent was again subpoenaed to testify before the grand jury at 10:00 A.M. on November 8, 1972 (A62). The Supreme Court had scheduled oral arguments on pending appeals for that date and, therefore, directed the Administrative Director to ask both Judge Helfant and Judge Moore to meet with it at its private conference room on that day (A62). The purpose of this meeting was to discuss with the two judges whether they should sit pending resolution of the grand jury investigation. Both of them appeared as requested and each met separately with the Court (A173). Both Judge Helfant and Judge Moore agreed not to sit in their respective courts until the completion of the grand jury investigation and the resolution of any charges which might emerge.[7] Their agreement not to sit obviated the need to consider whether formal proceedings should be instituted for their interim suspension. Although no order of their suspension was entered, the records of the courts show that neither man sat in his official capacity following the meeting of November 8, 1972.

(Footnote continued from preceding page)

fact that the New Jersey Supreme Court requested and received the transcript of the State Grand Jury proceedings. It is also significant that these matters were included in the allegations set forth in respondent's complaint (A63). Obviously, respondent concedes the veracity of these statements. Nevertheless, this Court may simply disregard these facts if it finds that they were improperly included in our petition.

[7] In his testimony before the United States District Court, Helfant said: "I am a municipal court judge in two municipalities but I have taken a voluntary leave of absence from both judgeships" (A83).

The federal complaint filed by Helfant alleged isolated incidents with respect to the meeting with the Supreme Court, but did not attempt to indicate their context. More precisely, respondent did not reveal the purpose of the meeting so that its significance could be evaluated. Candor required of one who seeks equitable relief surely demanded that Helfant either disclose the stated purpose or allege that none was revealed if it be so claimed. Yet, although respondent alleged that when he was asked to meet with the Court, he tried unsuccessfully to learn from the Administrative Director the purpose of the meeting, he did not contend that he was not so advised by the Supreme Court (A62). Nevertheless, that he was told that the purpose was to discuss whether he should continue to sit pending the disposition of the charges is inferable from his testimony that Chief Justice Weintraub said the Court was not interested in hearing the merits of the underlying controversy from Helfant (A86).

In any event, according to the allegations in the complaint, respondent was ushered into the Supreme Court's conference room where all of the justices were assembled (A62). Chief Justice Weintraub inquired of respondent whether he thought it proper for a judge sitting in criminal cases to invoke the Fifth Amendment privilege against self-incrimination[8] (A62). This was followed by a question propounded by Justice Mark A. Sullivan as to whether respondent had continued to preside following his invocation of the Fifth Amendment (A62-63). Justice Sullivan also asked whether respondent felt it appropri-

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[8] Chief Justice Weintraub has since retired as have two other justices who were present at the conference. Thus, only four of the seven justices who were present at the conference with Helfant are presently members of the Supreme Court.

ate to adjudicate the rights of others when he had refused to testify regarding his own activities (A62).

Although respondent's complaint alleged that both Chief Justice Weintraub and Justice Sullivan inquired into his prior assertion of the Fifth Amendment, he did not allege that any member of the Court suggested that he testify or offered any promise or threat if he did or did not testify (A90). The Fifth Amendment was not the focus of the meeting. Judge Moore, who had already testified freely before the grand jury, and Judge Helfant who had not, were dealt with in precisely the same fashion. Both agreed not to sit (A83). Nor did respondent ask to be relieved of that agreement after he testified before the grand jury, thus making it evident that nothing turned upon whether he chose to speak or be silent. Thus, respondent said in an affidavit annexed to the complaint, "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment" (Affidavit 4).

The complaint referred to other questions concerning Helfant's association with one Abe Schusterman, a State's witness who had previously appeared before the grand jury (A63). The focus of this inquiry related to allegations that Helfant and Schusterman had bribed an Atlantic County Court judge in a criminal case. As previously noted, Chief Justice Weintraub cautioned respondent not to discuss the merits of the Attorney General's investigation (A86). The import of the Chief Justice's remarks was that he was solely concerned with respondent's ability to continue to actively serve as a municipal court judge during the pendency of the grand jury investigation. Respondent informed the Court that he intended to cooperate with the grand jury and to testify (A64). Helfant alleged in his complaint that petitioner, Joseph Hayden,

who was conducting the grand jury investigation, entered the Supreme Court chambers as he was leaving (A65).

Following this conference, respondent proceeded to the grand jury room where he subsequently waived his Fifth Amendment privilege and responded to questioning. According to the complaint, Helfant was "emotionally upset" by virtue of his prior confrontation with the Supreme Court justices and testified only because he feared that he would otherwise be removed from office and disbarred (A64). As previously noted, he admitted, however, that none of the justices had threatened to take disciplinary action against him unless he waived his Fifth Amendment privilege (Affidavit 4). In any event, the import of respondent's testimony was wholly exculpatory (A33-41). Nevertheless, the grand jury subsequently returned an indictment charging respondent with conspiracy to obstruct justice (N.J.S.A. 2A:98-1), obstruction of justice (N.J.S.A. 2A:85-1), compounding a felony (N.J.S.A. 2A:97-1) and four counts of false swearing (N.J.S.A. 2A:131-4) (A18, *et seq.*).

Based upon these allegations, respondent sought a preliminary and a permanent injunction enjoining the Attorney General and others from prosecution of the indictment. Respondent's action was grounded upon his conclusory allegation of collusion between the Supreme Court and the Attorney General's office (A66). The Supreme Court's interest in the outcome of his case, according to Helfant, prevented him from having his constitutional claims fairly adjudicated in the State system and precluded the possibility of a fair trial (A66).

Petitioners moved pursuant to Rule 12(b)(6), *Fed. R. Civ.P.*, to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court thereafter conducted an evidentiary hearing with re-

spect to respondent's motion for a preliminary injunction. Following respondent's presentation of evidence, the district court denied injunctive relief and dismissed the complaint for failure to state a claim (A97). Noting that federal intervention was impermissible under the guidelines of *Younger* v. *Harris,* 401 U.S. 37 (1971), the court concluded that the prosecution was not instituted in bad faith or for the purpose of harassment and that respondent was not threatened with immediate or irreparable injury (A97-99). Significantly, the district court found that respondent's constitutional claim could properly be adjudicated by the New Jersey judiciary (A98). Specifically, the district court concluded that the involvement of members of the New Jersey Supreme Court in respondent's disciplinary proceedings did not impair their ability to fairly consider the merits of the pending criminal prosecution (A99). Further, the court was unwilling to presume that other members of New Jersey's judiciary would be infected by the Supreme Court's alleged interest in respondent's case. The court thus found it unnecessary to resolve the issue of whether respondent's testimony before the grand jury was the product of his free and unconstrained will.

A three judge panel of the Court of Appeals reversed the district court's order on September 10, 1973, and remanded for further proceedings (A102). Citing the inability of the New Jersey Supreme Court to impartially resolve respondent's constitutional claim, the order dismissing the complaint and denying respondent's application for injunctive relief was vacated (A119). The case was remanded to the district court for a hearing on respondent's motion for a preliminary injunction, and for a trial on the merits (A119). The court's conclusion was bottomed upon an assumption that the Supreme Court's prior involvement in respondent's case prevented the State courts from resolving the issues raised (A115).

Lacking a forum in the State courts, the court concluded that respondent's allegation of coercion could only be decided by the federal judiciary.

Petitioners thereafter petitioned the Court of Appeals to recall its mandate and applied for a rehearing, suggesting that the matter be heard *en banc.* See Rules 35 and 40, *Fed.R.App.P.* Because of the significant federal-state comity questions raised in petitioners' application, the full Court of Appeals subsequently agreed to hear the case (A120-122). On July 8, 1974, the court reversed the district court's order, three judges dissenting (A123). Although rejecting respondent's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for "a determination of whether [respondent's] testimony before the grand jury" was coerced (A167). In reaching this conclusion, the majority opinion did not distinguish between the substantive offenses and the false swearing charges contained in the indictment. Presumably, the court concluded that a finding of "involuntariness" by the district court would preclude the prosecution of respondent for false swearing and would prevent the State from introducing the allegedly tainted testimony at trial. In any event, the court directed the district court to conduct an evidentiary hearing and to set forth its conclusions in the form of a declaratory judgment. This appeal followed.

Summary of Argument

The Court of Appeals' *en banc* decision tears at the very roots of "Our federalism." Its effect is to paralyze the administration of a state judicial system and disrupt its criminal processes. At stake is the prerogative of a

state to effectively administer its laws. It goes without saying that federal interference of this magnitude is inherently abrasive. *Younger* v. *Harris*, 401 U.S. 37 (1971).

This case presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically, at issue is whether the "extraordinary circumstances" exception to the *Younger* interdiction was intended to establish a distinct category justifying federal intervention in a pending state criminal prosecution, or to be merely descriptive of the traditional standards of "bad faith" or "harassment." This Court has never delineated the contours of the "extraordinary circumstances" exception and scattered statements seem to indicate doubt on the part of some justices that such a distinct class exists. See, *e.g.*, Mr. Justice Black's opinion in *Perez* v. *Ledesma,* 401 U.S. 82, 85 (1971) and Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U.S. ——, ——, 94 S.Ct. 2191, 2209 (1974). If a separate category exists at all, it must be equated with the unavailability of a state forum for vindication of the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93.

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state criminal prosecution. On this basis alone, the issues raised here are highly significant. Assuming the existence of such a separate category, the majority grievously erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Alternatively, if the

majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims, the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the State Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activities. It is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey,* Article 6, Section 2, paragraph 3, N.J.S.A. 2A:1B-1, *et seq.* The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to determine whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to solicit the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice

and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a proper forum for vindication of respondent's constitutional claim.

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard,* 342 U.S. 117 (1951); *Fenner* v. *Boykin,* 271 U.S. 240 (1926).

Federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey,* 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence,* 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state

criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. There is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are not dealing with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona,* 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual does not necessarily render the procedure violative of due process. *Id.* at 467.

Even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U.S. 139, 141

(1911). See also *United States* v. *Knox*, 396 U.S. 77, 82 (1969); *Bryson* v. *United States*, 396 U.S. 64 (1969); *Dennis* v. *United States*, 384 U.S. 855 (1966); *United States* v. *Kahriger*, 345 U.S. 22, 32 (1952). Assuming coercion, the compulsion was not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

With respect to the substantive charges, it is to be emphasized that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for even significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 *U.S.C.* §2254(d). Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an immediate federal forum for a factual claim that may never ripen into controversy" (A165). Substantial interests of federalism are thus sacrificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity. It is respectfully submitted that these significant issues warrant a reversal of the Court of Appeals' decision and a dismissal of respondent's complaint.

REASONS WARRANTING REVERSAL

The New Jersey Supreme Court's inquiry into whether respondent should continue to serve as a member of the judiciary during the pendency of a Grand Jury investigation pertaining to his activities did not constitute such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution.

A. Introduction.

This case epitomizes the ever-increasing tension between the state and federal courts. At stake is the traditional power of the state judiciary to effectively administer the criminal law, and to ensure the integrity of its bench and bar. That authority has been placed in jeopardy by virtue of respondent's conclusory allegation that members of the Supreme Court of New Jersey will, in the future, refuse to obey the law they are constitutionally bound to enforce. Based upon that allegation, the Court of Appeals ordered the district court to conduct an evidentiary hearing and to determine whether the Supreme Court's inquiry into whether respondent should sit pending resolution of the grand jury investigation, conducted pursuant to its constitutional mandate, violated his Fifth Amendment privilege against self-incrimination. Suffice it to say, the Court of Appeals' decision is, in and of itself, an unwarranted interference with the efficient operation of the State's judiciary.[9] Its officious and unjustified conclusion, standing alone, is inherently abrasive and has an enormous impact on the entire State judicial system, for it seriously impairs the independence of the New Jersey Supreme Court and

[9] Pursuant to the Court of Appeals' remand, respondent has subpoenaed members of the New Jersey Supreme Court to testify at the district court hearing.

threatens its ability to faithfully discharge its constitutional obligations.

The court below itself recognized the significance of the federal-state comity questions presented in this case (A124). It sought to minimize the precedential value of its decision, however, noting that "the operative facts" were peculiar to the State of New Jersey, where its Constitution vests in the Chief Justice and the State's highest court the total and complete administrative control over the entire judicial system (A145). The court further observed that the factual allegations contained in respondent's complaint were *sui generis* and in all likelihood would not recur (A145). The Court thus characterized the impact of its holding as "miniscule" and foresaw no future cases receiving much "precedential nourishment" from its opinion (A146).

Petitioners are constrained to emphatically disagree. Even were the court correct in its assumption that New Jersey's judicial system is indigenous to that State,[10] the

[10] The incidence of such constitutional provisions is not, in fact, limited to New Jersey. Eight states vest plenary administrative authority over judicial officers in the Chief Justice of the State's highest court. *Alaska, Const., Art.* VI, §16; *Arizona, Const., Art.* 6, §3; *Colorado, Const., Art. VI,* §5(2); *Delaware, Const., Art.* 4, §13; *Florida, Const., Arts.* 2 and 5; *Hawaii, Const., Art.* 5, §5; *Illinois, Const. Art.* 6, §16; *Oklahoma, Const.,* Art. VII, §6. Nine states vest in the Chief Justice the power to temporarily assign or transfer at will subordinate judicial officers to any court within the state system: *Alaska, Const., Art.* IV, §16; *Colorado, Const., Art.* VI, §5(3); *Florida, Const., Art.* 5, §12; *Illinois, Const., Art.* 6, §16; *Missouri, Const.,* Art. V, §6; *North Carolina, Const., Art.* IV, §9; *Pennsylvania, Const., Art.* V, §15 (limited to assignment of retired judges); *Washington, Const., Art.* IV, §2(a).

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injury would be no less acute or *de minimus* because it affects but one of fifty jurisdictions. Nor was the court correct in assuming that the factual pattern which emerged in this case might not be a recurring one. In New Jersey, the Supreme Court is duty-bound to inquire into allegations of judicial misconduct, and these investigations do not generally await the conclusion of pending and related criminal charges.[11] Thus, there exists a strong likelihood of continued federal intervention. The majority opinion, therefore, sets an unwholesome and dangerous precedent which warrants reversal.

The decision below emasculates longstanding principles of comity and federalism. It is well settled that our federal system contemplates a policy which permits state courts to try criminal cases free from interference by the federal judiciary. *Younger* v. *Harris,* 401 U.S. 37, 46

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The Oregon Constitution authorizes such transfers but requires enacting legislation. *Ore., Const., Art.* VII, §2(a). The Arizona provision is similar to New Jersey's and is not limited to temporary assignments. *Arizona, Const., Art.* VI, §3. Ten state constitutions provide for direct Supreme Court involvement in removal, suspension and disciplinary proceedings against judicial officers: *Alabama, Const., Art.* VII, §§173, 174; *Alaska, Const., Arts.* 4 and 10 (see also *A.S.* §22.30,070); *California, Const., Art.* IV, §§16, 106; *Colorado, Const., Art.* VI, §23; *Delaware, Const., Art. IV,* §§37; *Florida, Const., Art.* V, §12; *Indiana, Const., Arts.* 4 and 7; *Kansas, Const., Arts.* 3 and 15; *Louisiana, Const., Art.* IX, §§1, 5; *Texas, Const., Art.* XV, §6.

[11] The court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a related criminal case. Actual prosecution of ethics charges, however, generally does not commence until the criminal prosecution has run its course.

(1971). Many and varied considerations support this well-recognized doctrine. Basic to the rule is the precept that courts of equity should not restrain a criminal prosecution where an adequate remedy at law exists and no irreparable injury would obtain. Within the bounds of the Constitution, limited federal equitable jurisdiction prevents "erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the [federal] rights asserted." *Id.* at 44. Vital among the considerations determinative of equitable jurisdiction is the concept of comity, "that is, a proper respect for state functions. . . ."[12] *Id.* at 45. In essence, an accused should be compelled to rely upon his defenses in the state courts, "unless it plainly appears that [this] course would not afford adequate protection." *Fenner* v. *Boykin,* 271 U.S. 240, 244 (1926). See also *Samuels* v. *Mackell,* 401 U.S. 66, 72 (1971). Stated another way, "a pending state proceeding, in all but unusual cases . . . provide[s] the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . . ." *Steffel* v. *Thompson,* —— U.S.

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[12] The policy against federal interference with state functions is deeply rooted in our history. It bears repeating that our union was established by thirteen uneasy states fearful of national encroachment upon their independence. The national government received an assigned role dependent upon specific constitutional authorization. All else was reserved to the states. As noted in Judge Adams' dissenting opinion, the first formal expression of the *"Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued 'to stay proceedings in any court of a state.'" (A148). See 1 *Stat.* 335, the forebearer of 28 *U.S.C.* §2283. Although suits entertained under the Civil Rights Act form an exception to the proscription contained in the anti-injunction statute (see *Mitchum* v. *Foster,* 407 *U.S.* 225 (1972)), section 2283 represents a long standing public policy against federal interference in state proceedings.

——, 94 S. Ct. 1209, 1216 (1974). Thus, apart from the traditional prerequisite to obtaining an injunction, *i.e.*, irreparable injury, the "fundamental policy against federal interference with state criminal prosecutions requires the additional showing that the irreparable harm be both great and immediate." *Younger* v. *Harris, supra* at 46. "[T]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 47. In short, there must be an allegation that the state prosecution was undertaken in bad faith or for purposes of harassment, or that "other unusual circumstances" exist which would justify federal interference, and that the constitutional harm sought to be averted is both "great and immediate." *Id.* at 54. See also *Perez* v. *Ledesma,* 401 U.S. 82, 85 (1971).

These well recognized requirements are equally applicable when considering the propriety of issuing declaratory relief where there is a pending prosecution in the state courts. Compare *Steffel* v. *Thompson, supra,* with *Samuels* v. *Mackell, supra.* See also *Great Lakes Dredge and Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). In cases where criminal proceedings are initiated prior to the institution of a federal civil suit, "the propriety of declaratory and injunctive relief should be judged by essentially the same standards." *Samuels* v. *Mackell, supra* at 72. As this Court has aptly observed, "[i]n both situations deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention. . . ." *Ibid.* "[A] declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid." *Ibid.* Thus, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in

determining whether to issue a declaratory judgment." *Id.* at 73. Specifically, it is incumbent on the plaintiff to allege facts amounting to bad faith harassment which has caused or threatens to cause great, immediate and irreparable injury. We submit that the complaint in this case falls far short of satisfying these well-settled criteria.

B. The "Extraordinary Circumstances" Requirement

The single most salient feature of this case is that the prosecution of respondent "grew out of an ongoing State Grand Jury [i]nvestigation into alleged acts of misconduct initiated prior to the incidents" averred in the complaint (A98). It is clear that neither bad faith nor harassment was present in Helfant's prosecution despite respondent's *ipse dixit* assertion to the contrary. "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma, supra* at 85. Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid.*

The factual pattern in *Dombrowski* v. *Pfister,* 380 U.S. 481, 486, 490 (1965), is illustrative of what constitutes a bad faith prosecution. There, the appellants offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten the initiation of new prosecutions under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies

of the illegally seized documents to obtain grand jury indictments on charges of violating the same statutes. Quite obviously, federal intervention was necessary to protect appellants from the prosecutor's malicious machinations.

Honey v. *Goodman,* 432 F.2d 333 (6 Cir. 1970), also reveals the broad contours of the "bad faith" exception. There, plaintiffs mailed letters to persons protesting the arrest and trial of several persons. As a result, they were charged with the offense of embracery. Plaintiffs petitioned the federal court to enjoin their prosecution on the grounds that the criminal actions were instituted in bad faith, with no real hope of ultimate success, for the sole purpose of deterring them from the expression of unpopular ideas. The district court dismissed the complaint. On appeal, the Court of Appeals held that the lower court erred in dismissing the suit because if the plaintiffs proved that the prosecution had been instituted without expectation of ultimate success and for the purpose of discouraging the exercise of their rights, they would have revealed the bad faith necessary to secure an injunction against a pending state proceeding. See also *Eames* v. *Pitcher,* 468 F.2d 905 (5 Cir. 1972); *Holmes* v. *Giarusso,* 319 F. Supp. 832 (E.D. La. 1970).

Federal relief against a pending state prosecution was also granted in *Shaw* v. *Garrison,* 467 F.2d 113 (5 Cir. 1972). There, plaintiff had been charged with conspiring to assassinate President Kennedy and had been acquitted. Following his acquittal, the District Attorney secured an indictment charging the plaintiff with committing perjury at his trial. The federal court enjoined the perjury prosecution because it believed that there was a serious question as to whether the conspiracy charge had any basis and it found that the prosecutor had taken extreme measures in extracting information from the State's witnesses, thus raising serious questions as to the validity and objectivity of the State's case. The Court issued the injunction in order to prevent the District Attorney from hounding an innocent person.

A state prosecution was also enjoined in *Krahm* v. *Graham,* 461 F.2d 703 (9 Cir. 1972). There, bookstore owners were charged with violating obscenity statutes. Eleven cases came to trial and none resulted in convictions. As a result, city officials instituted more prosecutions against the store owners. The federal court issued an injunction against the prosecutions because the multiplicity of charges filed against the plaintiffs made it impossible for them to raise their constitutional claims in a single criminal proceeding. See also *Miami Health Studios* v. *City of Miami Beach,* 353 F. Supp. 593 (S.D. Fla. 1973).

The foregoing cases illustrate the kind of conduct by state authorities that would constitute "bad faith" or "harassment" and which would give rise to a right to federal equitable relief during the pendency of a state prosecution. The cases can be divided into two categories: (1) where a prosecutor brings a prosecution with no expectation of securing a conviction, and (2) where state authorities have pursued a course of continuous harassment, characterized by repeated arrests and prosecutions. Proof that a prosecutor has engaged in such conduct merits federal intervention in the state criminal process only because it clearly demonstrates that the prerequisite to federal injunctive relief, *i.e.,* irreparable harm or the inability to remove the threat by defense against a single criminal prosecution, has been met. When a prosecutor procures an indictment against an individual without expectation of securing a conviction, he is not interested in bringing the case to trial. Consequently, if the defendant were not entitled to federal relief, he would be left without a forum in which to assert his constitutional rights.

Similarly, the criminal defendant who is subjected to continuous harassment and repeated prosecutions needs the assistance of the federal courts if his constitutional rights are to be protected because even a successful defense of those rights in the state courts results in further prosecution. Such a defendant cannot eliminate the threat to his constitutional rights defending in a single criminal trial.

Unassailably, nothing in the complaint reveals bad faith in bringing the prosecution in this case. Nor does Helfant's new claim of entrapment, first raised in his cross-petition, support a finding of bad faith. And as we will later note, even assuming that Helfant was "entrapped," there is no reason to presume that the State court system cannot properly adjudicate that issue. So too, respondent's gratuitous allegation that there was "collusion" between the Attorney General and members of the Supreme Court does not provide a triable issue with respect to "bad faith." We will subsequently discuss Helfant's contention in this regard in another section of our brief. Suffice it to say at this point, the Attorney General's alleged disclosure of the grand jury minutes neither violated federal constitutional principles nor contravened State policy regarding the separation of powers doctrine. Clearly, Helfant's constitutional rights can be vindicated in a single prosecution in the State courts.

Notwithstanding the fact that the State prosecution antedated the incidents averred in the complaint, the majority concluded that the New Jersey Supreme Court's disciplinary investigation which immediately preceded respondent's appearance before the grand jury constituted such "extraordinary circumstances" as to compel federal intervention in a pending state criminal prosecution (A144; A147). This case thus presents the novel question

of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically at issue is whether the "extraordinary circumstances" exception to *Younger's* interdiction was intended to establish a distinct category justifying federal intervention, or whether this Court intended the phrase to be merely descriptive of the traditional standards of "bad faith" or "harassment." In any event, this Court has never delineated the contours of the "extraordinary circumstances" exception. As noted in the dissenting opinion, "scattered statements by the Court seem to indicate doubt on the part of some of the justices that any such exception exists at all" (A162). See, *e.g.,* Mr. Justice Black's opinion in *Perez* v. *Ledesma, supra* at 85. See also Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U.S. ——, 94 S.Ct. 2191 (1974).

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state prosecution. Even assuming the existence of such a category, however, the court erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Plainly, the federal question is whether the State courts provide a proper forum for resolution of respondent's claim.[13] In petitioners' view, the "extraordinary

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[13] See, *e.g., Gilliard* v. *Carson,* 348 *F.Supp.* 757 (M.D.Fla. 1972). There, plaintiffs, as representatives of a class consisting of indigent citizens facing prosecution in the municipal court of

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circumstances" finding of the majority must be predicated on the claim that the State judicial system could not vindicate respondent's federal constitutional rights. Assuming, as we must, that the New Jersey courts are capable of fairly adjudicating the issues relating to respondent's guilt or innocence, the federal inquiry ends. The mere

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Jacksonville, Florida, asserted that the Court did not provide counsel for persons who faced imprisonment. The Court in *Gilliard* found that the City of Jacksonville had failed and was failing to provide counsel to indigent defendants in its municipal court who were facing incarceration and the only alternative to federal equitable relief was for each indigent citizen to petition for a writ of habeas corpus after he had been confined unlawfully. There being no opportunity for the indigent persons to raise their claims in the local tribunal, the federal court granted relief.

Another case that may have some bearing is *Scott* v. *Miller*, 449 *F.*2d 634 (6 Cir. 1971). There, the plaintiff had been convicted of murder in Kentucky and he appealed his conviction to the Kentucky Court of Appeals, the State's highest court. While the appeal was pending, the criminal defendant asked a federal court to enjoin the Kentucky tribunal from hearing his appeal. The basis of his federal suit was an allegation that a decision by the State Court of Appeals would violate his constitutional rights because the judges on the Court had been elected from malapportioned districts. The district court dismissed the plaintiff's complaint and the Court of Appeals affirmed, holding that *Younger* precluded intervention since the plaintiff could assert his claim before the Kentucky court and, if unsuccessful there, could petition the United States Supreme Court for a Writ of Certiorari. While the Court did not discuss the question, it is interesting that the possible subjectivity of Kentucky's appellate judges and the appearance of impropriety in having judges rule on the validity of their own elections was not considered to be a ground for federal relief, while a state prosecution was pending on appeal.

appearance of impropriety does not present a federal question. Indeed, to hold otherwise is to not merely exalt, but enthrone form over substance because "[i]t is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court. . . ." *Dombrowski* v. *Pfister,* 380 U.S. 479, 484 (1965).

Distilled to its essence, the majority opinion adopted respondent's contention that "the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire State court system in processing his constitutional claim" (A136). The majority opinion is thus predicated upon the astounding and unjustified assumption that the entire State judiciary would be nocuously infected by virtue of the Supreme Court's inquiry whether respondent should continue to preside pending resolution of the grand jury investigation. More shocking, however, is the unwarranted conclusion that this inference of pervasive tendentious predisposition exists without any consideration of the motivation of the State Supreme Court in conducting its conference with respondent. Even if respondent's will was overborne and he was thus "coerced into testifying," there can be no assumption of partiality or bias absent a showing of some malevolent intent on the part of the members of the Supreme Court. Succinctly stated, respondent's complaint is barren of any allegation supporting the stultifying assumption entertained by the majority that the State courts do not provide an effective forum for resolution of the constitutional claims asserted here.

Plainly, there was nothing ominous in the Supreme Court's conference with respondent. New Jersey's Con-

stitution[14] and statutory law[15] confer broad administrative responsibility on the Supreme Court to insure public confidence in the bar and the bench. The Chief Justice serves as the "administrative head" of the court system and assigns and transfers members of the judiciary to the various divisions and parts. *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. As a matter of state practice, all disciplinary actions are initiated and supervised by the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Moreover, removal or suspension of a member of the judiciary lies in the sole province of the Supreme Court. See, *e.g.*, N.J.S.A 2A:1B-3; N.J.S.A. 2A:1B-7; N.J.S.A. 2A:1B-9. And significantly, "the Constitution [and statutory law] place the administrative control of the municipal court in the Supreme Court and the Chief Justice." See *Kagan* v. *Caroselli,* 30 N.J. 371, 379, 153 A.2d 17, 21 (1959). See also *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Thus, the Supreme Court "is charged with responsibility for the overall performance of the judicial branch . . ." and this broad grant of authority includes the "power reasonably necessary" to fulfill its constitutional and statutory obligations. *In re Mattera,* 34 N.J. 259, 264, 168 A.2d 38, 45 (1961). See also *State* v. *DeStasio,* 49 N.J. 247, 253, 229 A.2d 636, 639 (1967), *cert.* denied 389 U.S. 830 (1967).

The mere fact that it is incumbent on the New Jersey Supreme Court to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Certainly, a judicially disciplined mind is able to remain impartial. *Cf. American Trial Lawyers Ass'n* v. *New Jersey Supreme Court,* 409 U.S. 467 (1973). See also *United States* v. *Grinnell Corp.,* 384 U.S. 582, 583 (1966); *Napolitano* v. *Ward,* 457 F.2d 279, 282 (7 Cir. 1972); *DeVita* v. *Sills,* 422 F.2d 1172 (3 Cir. 1970). Further, it is a slur on the entire State judicial system to presume that a biased judge would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2.[16] Thus, there is no reason to assume that the entire State judicial system is morally and ethically bankrupt.

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[14] The New Jersey Constitution vests in the Chief Justice the power to temporarily assign Superior Court judges to the Supreme Court. *Constitution of New Jersey, Article 6, Section 2,* paragraph 1. The Supreme Court has jurisdiction "over admission to the practice of law and the discipline of persons admitted." *Constitution of New Jersey, Article 6, Section 2,* paragraph 3. In addition, the Supreme Court makes rules governing practice and procedure and exercises appellate jurisdiction "in the last resort in all causes provided in [the] Constitution." *Constitution of New Jersey, Article 6, Section 2,* paragraphs 2 and 3.

[15] The constitutional authority to discipline, suspend or remove members of the judiciary is supplemented in statutory provisions. The Supreme Court may institute removal proceedings "on its own motion." N.J.S.A. 2A:1B-3. Removal may be based upon "misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2A:1B-2. The Attorney General is to prosecute proceedings for removal. N.J.S.A. 2A:1B-5. In all instances, the defending judge has the right to counsel, compulsory process and other constitutional protections guaranteed by the Fourteenth Amendment. See, *e.g.,* N.J.S.A. 2A:1B-6, 7, 8 and 9.

[16] Even if all four present members of the New Jersey Supreme Court who sat at the time of the events averred in the indictment disqualified themselves, depriving the Court of the requisite five justice quorum, the presiding justice (presumably Chief Justice Richard Hughes, who was appointed subsequent to the events alleged in the complaint) is authorized to appoint judges of the Appellate Division of the Superior Court of New Jersey to fill the vacancies. R. 2:13-2.

The Supreme Court's obligation to the bench, the bar and the public, grounded in the State Constitution and statutory law, cannot await formal indictment, trial and conviction. See *DeVita* v. *Sills, supra.* The Court's obligation to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. While these inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed.

Here, for example, allegations of abuse of office had been aired, and it was incumbent upon the State Supreme Court to determine whether respondent intended to preside in his official capacity during the pendency of the Attorney General's investigation. As is evident from its inquiry, the Court's concern was focused upon its fear that public respect and confidence in the judicial process would be diminished by virtue of respondent's continued participation as a judge during the pendency of a grand jury inquiry into his own activity. In his complaint respondent alleged no intent on the part of the Supreme Court to affect the grand jury proceedings, or to compel him to testify. Nor does the fact that the conference fortuitously occurred immediately prior to the respondent's scheduled appearance before the grand jury support an inference of any interest on the part of the members of the Supreme Court in the outcome of the Attorney General's criminal investigation.

The majority below recognized the importance of maintaining both the appearance and existence of judicial integrity[17] (A143). The court further alluded to the well

[17] Quoting Lord Herschell, the majority noted "[i]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it" (A143). See R. Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605, 606 (1928).

recognized policy of judicial restraint based upon "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law . . . ." *Stefanelli* v. *Minard,* 342 U.S. 117, 120 (1951) (A140). Paradoxically, the court concluded that both objectives could best be advanced by federal intervention in a criminal prosecution pending in the State courts. According to the majority, "[s]uch limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the 'brooding omnipresence' of the New Jersey Supreme Court" (A144).

Despite the majority's assertions to the contrary, the decision below in no way serves the interests of comity. Rather, it connotes a disturbing diffidence in the State judiciary. The majority opinion is predicated upon an assumption that members of the Supreme Court (1) will be predisposed against respondent, (2) that they will not disqualify themselves pursuant to settled New Jersey practice, (3) that they will utilize their broad administrative powers to coerce other State court judges, and (4) that the entire State judiciary will be intimidated by their interest in the outcome of the case. This feckless scenario not only taxes one's credulity, but is so absurd that its mere recitation commands its refutation.

C. The "Great and Immediate" Harm Requirement.

We now turn to the second requirement of *Younger* v. *Harris, supra;* namely that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Id.* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized

doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey*, 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence*, 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Fiss, *Injunctions* 2-9 (1972). Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise line that separates the jurisdiction of the two coequal judiciaries. It bears repeating that our national Constitution calls for judicial parallelism and not federal hegemony. This is not to denigrate the federal judiciary's responsibility to protect and to safeguard the constitutional rights of our citizens. Plainly, the federal judiciary is supreme and the state judicial system is subordinate in resolving federal constitutional questions. But there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the most limpid and compelling of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available only in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. We submit that there is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which

could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. As such, the complaint fails to set forth any constitutional injury, much less one that is both "great and immediate." But even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. Hence, a finding of coercion would not affect trial on those counts in the indictment charging Helfant with false swearing. Further, since respondent's testimony before the grand jury was exculpatory, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely fictive and certainly does not resemble, much less, qualify, as "great and immediate."

In sum, what becomes ineluctably apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, Helfant has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation is chimerical and bears no relation to the State prosecution.

1. Justiciability of the Coercion Issue.

The judgment of the Court below requires the district court to determine whether respondent's "testimony before the State Grand Jury, given on November 8, 1972,

was the product of a free and unconstrained will" (A167). Petitioners take it to be evident that the issue is not whether Helfant's "will" not to testify was overcome by official inquiry into his criminal involvement, or the consequences which might lawfully ensue if he chose not to speak. What must be shown, rather, is that Helfant was "coerced" by the New Jersey Supreme Court by virtue of some unlawful act or unconscionable promise. Surely, one who decides to testify before a grand jury or a petit jury, in the hope that he will not be indicted or convicted, cannot say his Fifth Amendment privilege was denied because the State was pursuing him in accordance with the discharge of its duty to enforce the criminal law. Nor can it be said that every judge and every lawyer who chooses to testify can assert that his free will was overcome because the Supreme Court of the State holds the responsibility to remove, suspend or disbar. Nor would the judge's or the lawyer's position be strengthened if he added his belief that the justices of the Supreme Court would privately regret a plea of the Fifth Amendment by an individual so situated. Nor could the claim be given efficacy by a paranoiac fear that the members of the State Supreme Court would surreptitiously or corruptly impose some penalty in violation of their oaths of office.

The essence of a claim that a waiver was involuntary is not that the individual was persuaded by circumstances to conclude that the less onerous course was to speak, but rather that government extorted the waiver by some misbehavior. Clearly, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. It would be extraordinary indeed to say that such an allegation creates a basis for federal interference with removal or disbarment proceedings.

In his complaint, respondent alleges that he was asked to meet with the Supreme Court. There is nothing inherently wrong in that procedure. As pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. See *DeVita* v. *Sills, supra.*[18]

It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unsettle individual members of the bar, no malevolent purpose can be imputed. And, although the complaint charges communications between the Supreme Court and the Deputy Attorney General (which we will later discuss in some detail) handling the grand jury investigation, there is nothing invidious or extraordinary in this procedure. Such communications are routine whenever the question of the fitness of a judge (or a lawyer) comes to the attention of the Court. Surely

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[18] In that case, the Court of Appeals for the Third Circuit recognized this obligation and approved the State mechanism for disciplinary matters. Yet, in the case now before this Court, the majority opinion below disavowed this conclusion, implicitly determining the procedure to be unconstitutionally coercive. In the petitioners' view, the decision below has thus raised a constitutional question as to every disciplinary matter which fortuitously involves a criminal investigation or prosecution. The effect of the decision, in sum, is to preclude the State Supreme Court from exercising its constitutional responsibility.

the complaint adds nothing of legal moment when it characterizes such communications as "collusive".[19]

What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process. *Id.* at 467.

The context of the New Jersey Supreme Court's inquiry here was not facilitation of the criminal investigation but the protection of the judicial system from public ridicule. This fact is critical since the primordial purpose of the Fifth Amendment is to prevent overbearing by governmental agencies. No doubt, the desire to obtain a conviction can lead to overzealous activity and abuses of power. Through the Fifth Amendment, the framers of the Bill of Rights sought to avoid official transgression in the acquisition of confessions. This purpose is made evident by an examination of the history behind the Fifth Amendment. As this Court recently stated:

> "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. (citations omitted). Certainly anyone who reads accounts of those investigations . . . cannot help but

[19] In New Jersey, the grand jury is an arm of the Superior Court, and responsibility for its administration lies with the judiciary. See *e.g., In re Jeck*, 26 N.J.Super. 514, 98 A.2d 319 (App.Div.1953).

> be sensitive to the framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Michigan* v. *Tucker*, —— U.S. ——, ——, 94 S.Ct. 2357, 2361-62 (1974).

It is thus clear that the Fifth Amendment is meant to protect citizens against the use of unlawfully obtained inculpatory evidence and to protect against governmental overreaching. It is to this latter consideration that this Court has most frequently turned its attention. See *e.g., Michigan* v. *Tucker, supra; Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Rochin* v. *California*, 342 U.S. 165 (1952); *United States* v. *Carignan*, 342 U. S. 36 (1951).[20]

[20] The original common law rationale for the exclusion of involuntary confessions was that they were inherently untrustworthy. Thus, the voluntariness concept was strictly a principle of common law evidence based on the premise of exclusion of probably, or perhaps only possibly, untrue inculpatory statements which, by reason of their dramatic nature, are likely to have a decisive effect on the trier of facts. The underlying psychological basis of this rationale has been questioned for there is doubt whether there is a substantial danger of false confessions when coercion has been exerted. Professor McCormick, perhaps the leading proponent of this contention, arrives at this conclusion employing reasoning as follows:

> "If we revert, however, to our first inquiry as to whether the danger of false confessions is substantial enough, beyond the danger of untruth in out of court statements generally,

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Accordingly, not every "compelling" influence resulting in an individual's decision to testify violates the Fifth Amendment privilege. Numerous pressures necessarily

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> to warrant the special rules restricting the admissibility of confessions the answer certainly cannot be a confident 'yes'. It may well be doubted whether confessions of guilt, even where they are extorted by pressure of force or fear, are not reasonably trustworthy . . . Accordingly, it seems clear that while the policy on which all rules of competency are founded, the policy of safeguarding the trustworthiness of evidence admitted, has had an ancillary role in shaping the rules restricting the admission of confessions, the predominant motive of the courts has been that of protecting the citizen against the violation of his privilege of immunity from bodily manhandling by the police and from other undue pressures described [as] the third degree." McCormick, *Evidence*, §109, p. 229 (1954).

For further authority supporting this thesis see McCormick, *"The Scope of Privilege in the Law of Evidence,"* 16 *Texas L. Rev.* 447, 451, 457 (1938); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 *Texas L. Rev.* 239, 245 (1946); Allen, "Due Process and State Criminal Procedures: Another Look," 43 N.W.U.L. Rev. 16, 19 (1953); Maguire, *Evidence of Guilt*, 109 (1959); Note, 63 *Michigan L. Rev.* 381 (1964); Note, 31 *U. Chi. L. Rev.* 313, 320 (1964).

In 1936, the voluntariness doctrine was raised to constitutional rank in the landmark case of *Brown* v. *Mississippi*, 297 U.S. 278 (1936), which held that it was a clear denial of due process guaranteed by the Fourteenth Amendment to admit into evidence a defendant's confession which had been tortured from him by state officials. The *Brown* Court reasoned that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which be at the base of all our civil and political institutions." *Id.* at 286. See also *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964). See cases collected in 3

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come to bear on an individual whose activities are the subject of governmental investigation. The very fact of the investigation, or the apparent proofs adduced, may influ-

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Wigmore *Evidence*, §820(D), p. 306, fn. 1 (*Chadbourne Rev.* 1970). The rationale of this constitutional doctrine does not relate to the trustworthiness or reliability of the statement as evidence. "[T]he reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne." *Jackson* v. *Denno*, 378 U.S. 368, 385 (1964).

In 1944 this Court decided *Ashcroft* v. *Tennessee*, 322 U.S. 143 (1944) and in every confession case since then (with one exception) the deterrence rationale has been the primary component in the Court's "complex of values" test. The exception was *Stein* v. *New York*, 346 U.S. 156 (1953) wherein this Court reverted to the trustworthiness rationale. "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Id.* at 192. This approach to the problem, however, proved to be short lived as a constitutional principle and its ultimate demise was foreshadowed eight years later when this Court decided *Rogers* v. *Richmond*, 365 U.S. 534 (1961). Mr. Justice Frankfurter, writing for the Court, spoke directly to the trustworthiness and deterrence concepts:

> "[C]onvictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial system and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not

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ence an individual to alter an intention to remain silent. So too, that formal criminal charges may be imminent

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> by coercion prove its charge against an accused out of his own mouth [citations]. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed." *Id.* at 540-541.

When this Court decided *Jackson* v. *Denno* three years later it rejected the premise that "the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession" and expressly overruled *Stein*. *Id.* at 383 and 391. In *Jackson* it was again made clear that the constitutional concept of voluntariness was rooted in the deterrence theory expounded in *Rogers,* and the concept was further explained later in the following words:

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because 'of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' [citing *Blackburn* v. *Alabama,* 361 U.S. 199, 206 (1960)] and because of 'the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York,* 360 U.S. 315, 320-321 (1959); *Jackson* v. *Denno, supra* at 385-386.

may well "compel" the "accused" to lay bare the details of his defense or to offer an explanation for his conduct. Suffice it to say, the resulting "compulsion" may spring from a panoply of sources, including social, professional and familial pressures. The federal Constitution is not offended by the revelation of criminal conduct under such circumstances, or by a judgment that continued silence is not in the accused's best interest.

Necessarily, the issue "must be resolved in terms of balancing the public need on one hand, and the individual claims to constitutional protection on the other." See plurality opinion by Mr. Chief Justice Burger in *California* v. *Byers,* 402 U.S. 424, 427 (1971). As aptly stated by Mr. Justice Harlan, "If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Id.* at 453. And as noted by a majority of this Court in *Harrison* v. *United States,* 392 U.S. 219, 222 (1968), "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him."

So too, in *Williams* v. *Florida,* 399 U. S. 78, 83-84 (1970), this Court said:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their iden-

tity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."

Similarly, in *McGautha* v. *California,* 402 U.S. 183, 213 (1971), against the backdrop of a contention that a unitary trial penalized a defendant who wanted to testify as to punishment but not as to the issue of guilt, this Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments as to which course to follow. *McMann* v. *Richardson,* 397 U.S. (759) at 769, 90 S.Ct. (1441), at 1448, 25 L.Ed. 2d (763) at 772. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the

policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.

• • •

"It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.

Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

See discussion of these cases in *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972).[21]

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[21] Distinguishable are such decisions as *Leary* v. *United States,* 395 U.S. 6 (1969); *Marchetti* v. *United States,* 390 U.S. 39

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Consequently, there is no triable issue of coercion presented in this case. Helfant disavowed, under oath, any claim that any member of the Court directed him to waive the Fifth Amendment or made any threat in that regard. What remains, at most, is a baseless fear that the justices would somehow be faithless to their constitutional duty, an apprehension unsupported by any allegation of impropriety. When the complaint is carefully scrutinized, no more emerges than that the New Jersey Supreme Court was acting in the good faith exercise of its constitutional responsibility. We submit on the basis of respondent's complaint, the issue of "coercion," *i.e.*, improper pressure on Helfant, is not raised. Surely if some vestige of such a conclusory assertion is thought to be inferable, the supporting allegations are too exigous to warrant federal intervention in a pending state prosecution by either the extraordinary remedy of injunction or declaratory relief. See *e.g., Robinson* v. *McCorkle*, 462 F.2d 111, 114 (3 Cir. 1972), *cert.* denied 499 U.S. 1042 (1972); *Coopersmith* v. *Supreme Court*, 465 F. 2d 993, 994 (10 Cir. 1972).

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(1968); *Grosse* v. *United States*, 390 U.S. 62 (1968); *Haynes* v. *United States*, 390 U.S. 85 (1968), and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). The holdings in all of these cases were based on the fact that the laws in question were directed at a class of persons who were suspected of criminal activity and whose compliance with the requisite statutes would immediately expose them to prosecution. The State's disciplinary procedures at issue here are not directed to those suspected of criminal activity and certainly are not designed to compel them to incriminate themselves.

2. Effect of Coercion on the False Swearing Counts.

The authorities overwhelmingly hold that the Fifth Amendment does not authorize perjury or false swearing, and hence it is no defense that a waiver of the Fifth Amendment privilege was coerced. These authorities will be discussed at length, *infra*. We are at a loss, however, to understand the majority's handling of this issue. The dissenting opinion expressly agreed with our position. The majority opinion nevertheless was silent with respect to this issue. We think it is incomprehensible that the majority would silently decide this point against the State for two reasons. First, the majority could hardly ignore the wealth of authority laid before it. If it meant to disagree, it would surely have said so and explained why. Second, since the dissenting opinion spoke directly to the issue, and at some length, the majority would be expected to address the question. More importantly, there is no discernible basis for interfering in any way with the trial of the false swearing counts. As we noted above, upon receiving the opinion, we sought to elicit the majority's position by moving to vacate the stay as to the trial of the false swearing counts. Our motion was denied without explanation. We submit that there is no reason for a stay of Helfant's trial on these counts.

Even assuming that the Supreme Court's conference with respondent had the effect of coercing him into testifying, and that the State courts could somehow be considered incapable of adjudicating issues pertaining to this alleged "misconduct," the Court of Appeals was nevertheless in error in intervening in the pending prosecution for false swearing. Since the question of coercion is, as a matter of law, irrelevant to the issues to be considered at trial, it is equally apparent that such a claim could not affect or infect the "aura" of the State criminal proceed-

ings. Conceding for the purpose of argument the wholesale contamination of New Jerseys' judiciary, respondent has suffered no direct injury which would support federal equitable relief. That is true because the issue of coercion need never be presented to the State judiciary.

In determining the impact of a coercion defense on an indictment charging false swearing it is relevant to examine the scope of the Fifth Amendment privilege. That Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. "[I]t does not . . . reach forward to protect against incrimination for future acts." *In re Baldinger,* 356 F. Supp. 153, 162 (C.D. Cal. 1973).[22] In no sense is Fifth Amendment protection extended to perjured testimony. The privilege "does not endow the person who testifies with with a license to commit perjury.[23] *Glickstein* v. *United States,* 222 U.S. 139,

[22] New Jersey law is in accord. See *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972); *State* v. *Williams,* 59 N.J. 493, 284 A. 2d 272 (1971).

[23] Other courts, both state and federal, have held that untruthful testimony is not protected by the Fifth Amendment privilege. See *United States* v. *Irali,* 503 F.2d. 1295, 1302 (7 Cir. 1974); *United States* v. *Nickels,* 502 F.2d 1173, 1176 (7 Cir. 1974); *United States* v. *Tramunti,* 500 F.2d 1334, 1342-43 (2 Cir. 1974); *United States* v. *Devitt,* 499 F. 2d 135, 142 (7 Cir. 1974); *United States* v. *Hockenberry,* 474 F. 2d 247 (3 Cir. 1973); *United States ex rel. Annunziato* v. *Deegan,* 440 F.2d 304 (2 Cir. 1971); *Robinson* v. *United States,* 401 F.2d. 248, 251 (9 Cir. 1968); *United States* v. *Orta,* 253 F.2d 312, 314 (5 Cir. 1958), *cert.* denied 357 U.S. 905 (1958); *Claiborne* v. *United States,* 77 F.2d

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141 (1911). See also *United States* v. *Knox,* 396 U.S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U.S. 22, 32 (1952). Thus, in *Bryson* v. *United States,* 396 U.S. 64, 72 (1969), this Court characterized as unthinkable the "principle . . . [that] a citizen has a privilege to answer fraudulently a question that the government should not have

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682, 690 (8 Cir. 1935); *United States* v. *Provinzano,* 326 F.Supp. 1066, 1067 (E.D.Wis. 1971); *United States* v. *Ponti,* 257 F.Supp. 925 (E.D.Pa. 1966); *Moyer* v. *Brownell,* 137 F.Supp. 594, 605 (E.D.Pa. 1956); *United States* v. *Haas,* 126 F.Supp. 817 (E.D. N.Y. 1954); *United States* v. *Miller,* 80 F.Supp. 979 (E.D.Pa. 1948); *People* v. *Tomasello,* 21 N.Y.2d 143, 234 N.E.2d 190, 192-93 (Ct.App. 1967); *Cf. United States* v. *Wilcox,* 450 F.2d 1131, 1141 (5 Cir. 1971), *cert.* denied 405 U.S. 924 (1971); *Kronick* v. *United States,* 343 F.2d 436, 441 (9 Cir. 1965); *United States* v. *Parker,* 244 F.2d 682, 690 (7 Cir. 1957), *cert.* denied 355 U.S. 836 (1959); *United States* v. *Cason,* 39 F.Supp. 731, 734 (W.D.La. 1941); *Cf. United States* v. *Di Michele,* 375 F.2d 959, 960 (3 Cir. 1967). *Contra: People* v. *Allen,* 15 Mich. App. 387, 166 N.W.2d. 664 (Ct. of App. 1968). In *Allen,* police officers were subpoened to testify before a judge who was conducting an investigation into police corruption. Defendants were advised of their constitutional right to remain silent but testified nevertheless. Subsequently, they were charged with perjury based upon their grand jury testimony. It was asserted that defendants believed that invoking their privilege would have led to suspension from the police department. The court held that "a statement given as a result of a coerced waiver of Fifth Amendment rights can [not] be the basis for a perjury prosecution" 166 N.W.2d at 669. However, the court clearly misconstrued the Fifth Amendment protection afforded a defendant who utters a false statement, exculpatory on its face, before a grand jury. See discussion, *infra.* It is clear that the Fifth Amendment privilege pertains to past acts. Its inapplicability to perjury is equally clear. The court in *Allen* misconceived the function of the exclusionary rule, in disregarding the fact that defendants had been charged with perjury.

asked." There, it was noted that our "legal system provides methods for challenging the government's right to ask questions" and that "lying is not one of them." *Ibid.* In *Kay* v. *United States,* 303 U.S. 1, 6 (1938), this Court noted that "when one undertakes to cheat the government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the government in which the effort to cheat or mislead is made are without constitutional sanction." And in *Dennis* v. *United States,* 384 U.S. 855, 867 (1966), this Court reiterated that basic principle, stating:

> When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, *he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction . . . Analogous are those cases in which prosecutions for perjury have been permitted despite the fact* that the trial at which the false testimony was elicited was upon an indictment stating no federal offense; (*United States* v. *Williams,* 341 U.S. 58, 65-69, 71 S.Ct. 595, 599-601, 95 L.Ed. 747); *that the testimony was before a grand jury alleged to have been tainted by governmental misconduct* (*United States* v. *Remington,* 208 F.2d 467, 569 (C.A. 2d Cir. 1953), *cert.* denied, 347 U.S. 913, 74 S. Ct. 476, 98 L.Ed. 747 (1969); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter,* 348 F.2d 204, 208-210 (C.A. 2d Cir. 1965), *cert.* denied, 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed. 2d 360, and cases cited herein). 384 U.S. at 866 . . . The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. (emphasis added) 384 U.S. at 867.

See also *United States* v. *Pacente,* 503 F.2d 543, 549 (7 Cir. *en banc* 1974); *United States* v. *Nickels,* 502 F.2d 1173, 1176 (7 Cir. 1974); and *United States* v. *Devitt,* 499 F.2d 135, 141-42 (4 Cir. 1974); *Cf. Acanfora* v. *Montgomery City Board of Education,* 491 F.2d 498 (4 Cir. 1974) *cert.* denied —— U.S. ——, 95 S. Ct. 64 (1974).

This well settled rule of law is deeply rooted in reason and applies with equal force in this case. Even assuming that respondent's will was overborne, the compulsion emanating from his conference with the Supreme Court was to testify truthfully not falsely. Any other conclusion would reduce the witness' oath to a meaningless shibboleth. Moreover, assuming that respondent's waiver of his Fifth Amendment privilege was the product of his fear of removal from office or disbarment, that would not permit him to violate his oath and lie with impunity.

This Court has held that statements obtained during the course of disciplinary investigations under threat of dismissal from office cannot be used as evidence in a subsequent criminal prosecution. In *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), for example, this Court reversed the convictions of six New Jersey police officers who had testified before a grand jury after being advised of the then existing statute providing for job forfeiture upon refusal to testify. At trial, their grand jury testimony, which was highly inculpatory, was admitted against them as declarations against penal interest. In reversing, this Court concluded that dismissal from public employment under those circumstances exacted an unwarranted price for exercising the privilege. See also *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'r,* 392 U.S. 280 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967).

Significantly, defendants in *Garrity* did not testify falsely before the grand jury. On the contrary, they testified truthfully, thereby incriminating themselves as to past criminal misdeeds. Thus, this Court's holding in *Garrity* is in no way applicable to the facts here. Perhaps the most thorough analysis of the *Garrity* rationale as it affects the use of compelled but untruthful testimony can be found in *People* v. *Goldman,* 21 N.Y.2d 152, 287 N.Y.S. 2d 7, 234 N.E. 2d 194 (1967), appeal dismissed for want of a substantial federal question, 392 U.S. 643 (1968), rehearing denied 393 U.S. 899 (1968). There, defendant, a police officer, was charged with perjury after he executed a limited waiver of immunity and testified before a grand jury. It was urged on appeal that the waiver was void because "it was extracted on pain of losing his job." 234 N.E. 2d at 195. The argument was also advanced, using *Garrity* as authority, that since the waiver was the product of coercion, the false grand jury testimony could not form the basis of a perjury indictment. Judge Breitel, writing for a unanimous court, initially reasoned that the scope of the Fifth Amendment protection does not immunize "one . . . from prosecution . . . for perjurious or contumacious testimony." *Id.* at 197. Then, applying the rationale of *Glickstein* v. *United States, supra,* the court analogized the situation to one in which a witness is granted immunity; although the testimony is unquestionably coerced, no insulation is afforded from prosecution, conviction or punishment for perjury. It thus concluded that Fifth Amendment protection does not extend to or license untruthful statements. The holding of *Goldman* is plain. Despite the "coerced" waiver of immunity and subsequent testimony, the witness "is not immune from penalties for crimes inherent in the giving of the testimony itself." *Id.* at 198. It is noteworthy, too, that this Court subsequently dismissed Goldman's appeal for lack of a substantial federal question.

Similarly, in *People* v. *Ricker,* 45 Ill. 2d 562, 262 N.E. 2d 456 (1970), defendant was convicted of perjury. There, it was alleged that he had made contradictory statements before two grand juries. *Ricker* asserted that he had been threatened by his superiors with loss of his position as an attorney with the Metropolitan Sanitary District of Greater Chicago. As a public official, he could have been dismissed for refusing to waive his privilege against self-incrimination before the grand jury. The court recognized the mandate of *Garrity* that "[i]f he testified because he would otherwise have forfeited his public position, his testimony could not be used in a prosecution for a past crime." 262 N.E. 2d at 460. However, the court held:

> ". . . [W]hether the defendant was warned of his constitutional privilege, whether he properly signed his immunity waiver, or whether he could have been compelled to testify is beside the point. *He did testify, he testified falsely and he can be convicted of perjury.*" (emphasis added) 262 N.E. 2d at 461.

The Court in *Ricker* concluded that neither the Fifth Amendment nor *Garrity* was applicable since defendant had testified falsely before the grand jury. All conduct on the part of the Government, including the allegation of coercion, was disregarded. See also *People* v. *Genser,* 250 Cal. App.2d 351, 58 *Cal. Rptr.* 290 (1967).

Petitioners urge a similar treatment of the issue raised here. An individual who is compelled to appear and to testify before a grand jury is protected to the extent that his truthful testimony may not be used in a criminal proceeding against him. However, Helfant's perjurious misconduct before the grand jury must bar him in the instant case, from asserting that alleged governmental im-

propriety "coerced" him to so testify. When respondent appeared before the grand jury he had not yet committed the crime for which he is now indicted. His ". . . criminal liability concurred with the words he first uttered to the . . . Grand Jury." *United States* v. *Parker,* 244 F.2d 943, 947 (7 Cir. 1957). Further, the four counts which charge false swearing were not "based upon evidence of past acts obtained from the mouth of the [respondent] in violation of Fifth Amendment rights. Instead, [they were] based on a crime whose very commission, rather than evidence of commission was the [respondent's] testimony." *United States* v. *Ponti,* 257 F.Supp. 925, 926 (E.D.Pa. 1966). When a witness chooses to testify untruthfully, he is simply not protected by the Fifth Amendment from a resulting prosecution. *United States* v. *Miller, supra.* See also *United States* v. *Daniels,* 461 F.2d 1076, 1077 (5 Cir. 1972); *United States* v. *Manfredonia,* 414 F.2d 760, 765, fn. 3 (2 Cir. 1969); *United States* v. *Remington,* 208 F.2d 567, 569 (2 Cir. 1953), *cert.* denied 347 U.S. 913 (1953); *United States* v. *Parker,* 244 F.2d 682, 690 (7 Cir. 1957), *cert.* denied 355 U.S. 836 (1959); *United States* v. *Winter,* 348 F.2d 204, 208-209 (2 Cir. 1965), *cert.* den. 382 U.S. 955 (1965).[24] Thus, as the dissent properly points out, Helfant's testimony is admissible in evidence even assuming that it was coerced (A156).[25] Although the allegedly coerced testimony may not be used to establish respondent's commission of the substantive offenses, the State may use it to prove that he swore falsely.

[24] As Wigmore wrote:

> If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to testify truly; and the privilege by hypothesis would have been violated only if the witness had truely given self-incriminating evidence, but if he falsely exonerates himself, he has confessed no fact 'against himself' hence his privilege has not been infringed by the actual answer even though it might have been by some other answer. *VIII Wigmore, Evidence* §2282, p. 512 (McNaughton Rev. ed. 1961).

3. The Effect of Coercion on the Substantive Offenses.

What has been said thus far relating to the nature of respondent's claimed "constitutional" deprivation applies with equal force with respect to the hypothetical injury which would result from trial on the pending substantive charges. Assuming that respondent was coerced into testifying, that standing alone is insufficient justification to bar prosecution. In short, respondent's complaint nowhere alleges that Helfant gave testimony which is incriminatory. The State has stipulated that it deemed his testimony to be exculpatory, and therefore did not intend to use those statements, except perhaps on cross-examination of respondent if he should depart from them. And there is no allegation that Helfant intends to depart from his grand jury testimony. The dissenting judges below accordingly deemed the "coercion" issue wholly "conjectural," and unworthy of federal interference with the State's criminal process. We think the issue non-existent in the absence of an allegation of incrimination or some other prejudice in the defense to the criminal charges.

[25] This argument was vigorously advanced by petitioner below. Nevertheless, the majority opinion is devoid of any reference to it. Following the rendition of the Court's judgment issued in lieu of a formal mandate, petitioner moved for a recall of the Court's order and for clarification. Specifically, petitioners asked the Court to clarify whether a finding of coercion would preclude prosecution of the false swearing charges. The Court denied petitioners' application without any explanation.

It is beyond cavil that reception by a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment. See, *e.g. United States* v. *Calandra,* —— U.S. ——, 94 S.Ct. 613 (1974); *United States* v. *Blue,* 384 U.S. 251 (1966); *Lawn* v. *United States,* 355 U.S. 399 (1958); *Costello* v. *United States,* 350 U.S. 359 (1966); *Holt* v. *United States,* 218 U.S. 24 (1910). *Gelbard* v. *United States,* 408 U.S. 41 (1972) is not to the contrary. In *Gelbard,* this Court was presented with the narrow question of whether a witness before a grand jury who was cited for civil contempt for refusal to answer questions she believed were based on illegal wiretap evidence, has standing under 18 U.S.C. §2515 to suppress the evidence. The decision according defendant standing was based exclusively on federal statutory grounds. Thus, the sole relevance of *Gelbard* to the instant matter is its reaffirmance of the long standing rule that:

> "A defendant is not entitled to have his indictment dismissed before trial simply because the government acquired incriminating evidence in violation of the law, even if the tainted evidence was presented to the jury." *Id.* at 60.

One line of cases has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See *e.g. Goldberg* v. *United States,* 472 F.2d 513, 516 (2 Cir. 1973); *Jones* v. *United States,* 342 F.2d 863 (D.C. Cir. 1964); *United States* v. *Tane,* 329 F.2d 848 (2 Cir. 1964); *United States* v. *Lawn,* 115 F.Supp. 674 (S.D.

N.Y. 1953), appeal dismissed *sub nom, United States* v. *Roth,* 208 F.2d 467 (2 Cir. 1953). For example, the court in *Goldberg* v. *United States, supra,* observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of *Bruton* v. *United States,* 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg* v. *United States, supra* at 516.

It is submitted that this Court's decision in *United States* v. *Calandra, supra,* laid this debate to rest. But assuming that *Calandra* is not dispositive, the indictment in this case would not be subject to attack. It is settled that a mere appearance before a grand jury, albeit compelled, will not vitiate an indictment even if the witness asserts his privilege against self-incrimination. See *United States* v. *Wolfson,* 405 F.2d 779, 784-785 (2 Cir. 1968), *cert.* den. 394 U.S. 946 (1969); *United States* v. *Winter, supra; United States* v. *Addonizio,* 313 F.Supp. 486, 495 (D.N.J. 1970); *United States* v. *DeSapio,* 299 F. Supp. 436, 440 (S.D. N.Y. 1969). Clearly then, a witness must incriminate himself (absent a valid waiver) before the same grand jury which indicts him to give rise to the claim that the indictment so obtained is based on coerced testimony. Indeed, if the utterances are exculpatory, Fifth Amendment protection does not attach.

In his testimony before the grand jury, respondent vigorously denied all the facts material to the allegations against him. His testimony was entirely exculpatory and

thus could not rationally have provided the basis for the indictment; nor indeed could it have served to corroborate the other, independent evidence already before the grand jury. Thus, no "*Bruton*-type" problem could arise in this case. Compare *Goldberg* v. *United States*, *supra*. It is undoubtedly the other evidence—specifically the earlier testimony of two unindicted co-conspirators—upon which the Grand Jury relied in returning the first three counts of the indictment. This evidence, clearly competent and legally admissible, amply insulates the indictment against constitutional challenge. See *Costello* v. *United States*, *supra*. Respondent has thus suffered no prejudice by virtue of his "coerced testimony" before the grand jury. Therefore, the indictment must stand even if the rationale of the *Jones* and *Goldberg* line of cases is applied.

When a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coereed testimony and its derivative use. *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). It is equally clear that the "use" which is prohibited is the introduction of the "tainted" evidence at trial and not before a grand jury.[26] *United States* v. *Calandra*, *supra*. See also *United States* v. *Addonizio*, 313 F. Supp. 486, 494 (D. N.J. 1970). Thus, the

[26] New Jersey law is in accord. An indictment will not be vitiated merely because incompetent evidence was presented to the grand jury. See, *e.g.*, *State* v. *Ferrante*, 111 N.J. Super. 99, 268 A.2d. 301 (App.Div. 1970); *State* v. *Garrison*, 130 N.J.L. 350, 33 A.2d. 113 (Sup. Ct. 1943); *State* v. *Donovan*, 129 N.J.L. 478, 30 A.2d. 421 (Sup. Ct. 1943); *State* v. *Ellenstein*, 121 N.J.L. 304, 22 A.2d. 454 (Sup. Ct. 1938).

majority was correct when it determined that there was no basis in law for an outright injunction against prosecution, for an injunction under these circumstances would have been tantamount to a dismissal of the indictment.

However, the Court of Appeals improperly concluded that a finding of coercion by the district court would support a declaratory judgment to the effect that the allegedly tainted evidence may not be introduced at respondent's trial. As noted in the dissenting opinion, "the edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the State will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing" (A155). This is an eventuality which has not yet arisen and indeed will in all probability never come to pass.

Accordingly, adjudication of this issue by the federal court is plainly premature and in advance of constitutional necessity. There is no indication that the Attorney General intends to utilize respondent's testimony in any way. As previously noted, at oral argument before the Court of Appeals, counsel for the State represented that Helfant's grand jury testimony will be used, if at all, only to impeach any inconsistent statement respondent might utter should he take the witness stand.[27] It becomes ap-

[27] At oral argument, counsel for New Jersey stated "[a]t this time there is no present intention of using that testimony. But were the [respondent] to take the stand, were his testimony to deviate in strong terms, that, testimony then, of course, under *Harris* v. *New York*, [401 U.S. 222 (1970)] might well be" [admissible to impeach his credibility.] That concession was not prompted by an excess of altruism on the part of the Attorney General. It would surely be poor trial strategy for the prosecu-

(Footnote continued on following page)

parent that the constitutional injury sought to be averted by the majority is thus, at best, speculative, depending for its very existence upon a hypothetical series of events which probably will never occur.

A deeply embedded principle of our jurisprudence precludes the resolution of abstract disputes in advance of constitutional necessity, hence the constitutional requirement of a case or controversy. *United States Constitution*, Article III, Section 2; *Flast* v. *Cohen*, 392 U.S. 83, 95-98 (1966); *United States* v. *Freuhauf*, 365 U.S. 146, 157 (1961); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1944); *Muskrat* v. *United States*, 219 U.S. 346, 348 (1911); C. Wright, *Federal Courts* 34 (2d ed. 1963). Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through the judicial process." *Flast* v. *Cohen, supra* at 95. Whether grounded in constitutional principle, see, *e.g., Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Fairchild* v. *Hughes*, 258 U.S. 126 (1922),

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(Footnote continued from preceding page)

tion to seek to introduce respondent's exculpatory statements as substantive evidence. Indeed, Helfant's grand jury testimony would not qualify as a declaration against penal interest. Therefore, it would not be admissible under Rule 63 (10) of the *New Jersey Rules of Evidence*. So too, there is no authority which would support the admission of "compelled" statements to contradict a witness' trial testimony: *Cf. Harris* v. *New York, supra*. Nor would respondent's assertion of the defense of duress require the State courts to resolve the coercion issue. In New Jersey, the defense of duress would not be recognized under the facts here. *State* v. *Falco, supra; State* v. *Palmieri*, 93 N.J.L. 195, 199-200, 107 A. 407 (E. & A. 1919); Note, 102 *Harv. L. Rev.* 1071-72 (1954).

or viewed as a mere policy limitation, see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), federal courts have long avoided passing prematurely on constitutional questions. Judicial authority may be invoked only when the interests of litigants require protection against actual and immediate interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing," "ripeness," and "mootness" which have evolved over the years are incidents of the primary concept that "federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, [or] immediately threatened with harm, by the challenged action." *Poe* v. *Ullman*, 367 U.S. 497, 504 (1961). See also *O'Shea* v. *Littleton*, —— U.S. ——, 94 S. Ct. 669, 674 (1974); *Allee et al.* v. *Medrano, supra; Boyle* v. *Landry*, 401 U.S. 77 (1971). The same rule obtains whether the litigation concerns a challenge to the validity of a statute or the claimed denial of a constitutional right. *Cf. Cleary* v. *Bolger*, 371 U.S. 392, 402 (1963) (Goldberg, J., concurring).

These principles take on added significance when the federal courts are asked to interfere with a pending state prosecution. *Younger* v. *Harris, supra*. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial. As previously noted, a crucial aspect of *Younger's* limitation upon incursions into state proceedings is the necessity of a showing of "great and immediate" constitutional injury. *Id.* at 46. Absent this principle, "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of state courts by the federal forum . . . to determine the issue." *Stefanelli* v. *Minard, supra* at 117, 123-24 (1951). Further, this danger has become far more acute as our Constitution has been interpreted to em-

brace rights not previously thought to fall within its protection.

The majority's disregard of the "great and immediate" harm limitation thus emerges in sharp focus. More than a year and-a-half has passed since the grand jury returned the indictment charging respondent with crimes that allegedly occurred in 1968. During this time, New Jersey has been thwarted from proceeding with the prosecution. Significantly, one critical witness has died and other witness' memories have presumably dimmed. To the public, this delay must appear unseemly. Surely respect for the law is thereby diminished.

Nor is there any likelihood that this saga will come to an end in the near future. The court below has ordered a federal trial in the midst of state criminal proceedings in which respondent's challenge to the admissibility of evidence is to be resolved. This lengthy disruption seems unsupportable since the prosecution has represented that the evidence sought to be suppressed will never be used. In any event, it would be erroneous to conclude that the district court's judgment will finally resolve the issue. That prospect appears remote since there is a strong possibility of other appeals from the fact-finding proceedings which are to be conducted pursuant to the court's mandate.

It bears replication that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment

privilege. See 28 U.S.C. §2254(d).[28] Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the State's sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, the tension between the right of the state courts to try state cases free of federal interference and the interest of a citizen to immediate disposition of his federal constitutional claims by a federal court must be resolved by proscribing federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an immediate federal forum for a factual claim that may never ripen into controversy" (A165). Substantial interests of federalism are thus sac-

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[28] 28 U.S.C. §2254(d) provides in part that in federal district courts, upon an application for habeas, prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

rificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the inimical decision offends basic considerations of comity and tears at the very roots of "Our federalism."

D. Respondent's Contentions.

We must emphasize at the outset that Helfant's cross-petition did not respond in any meaningful way to our arguments. Surprisingly, respondent does not even attempt to support the basis for intervention upon which the majority of the Third Circuit rested its judgment; *i.e.*, that there was a triable issue as to whether his will not to testify was overborne. Rather, Helfant's cross-petition speaks only to the false swearing counts. As we pointed out above, the majority in the court below inexplicably ignored petitioners' contention that the Fifth Amendment privilege does not immunize a grand jury witness from a perjury or false swearing prosecution, despite the fact that the dissenting opinion discussed that issue at length. Significantly, Helfant's cross-petition fails to state whether the majority in the Third Circuit in fact dealt with the false swearing issue. More than that, Helfant does not challenge the validity of the authorities which we presented and upon which the dissenting opinion relied. Rather, petitioner now advances a totally different claim. Specifically, he contends that there was "entrapment" or some violation of due process for the Attorney General to summon him before the grand jury allegedly for the sole purpose of instituting false swearing charges.

Our response to the issue Helfant belatedly seeks to inject is as follows: First, this issue is simply not in

the case. The complaint did not make this allegation, nor was such a charge advanced or accepted by either the district court or the Third Circuit. See *e.g. Tacon* v. *Arizona*, 410 U.S. 351 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Nelson* v. *City of Los Angeles*, 362 U.S. 1 (1961); *Wilson* v. *Cook*, 327 U.S. 474 (1946).

Second, there is nothing in the record to support it. In substance, Helfant contends that because the State advised him that he was a "target," it must follow that the Attorney General expected him to lie. He argues that the Attorney General summoned him before the grand jury for the sole purpose of adding the false swearing charges to the substantive counts. But to say that a witness is a "target" is not to suggest that the investigation is completed. Nor does it necessarily follow that an indictment against such a witness is a certainty. It means only that information in the possession of the grand jury may lead to an indictment. See *e.g. In re Addonizio*, 53 N.J. 107, 248 A.2d 531 (1968); *In re Boiardo*, 34 N.J. 599, 170 A. 2d 816 (1961); *State* v. *DeCola*, 33 N.J. 335, 164 A.2d 729 (1960). It is not uncommon for a "target" to accept, and even to insist upon, an opportunity to testify in the hope that an indictment will not ensue. This is especially true with respect to men in public life, as to whom the bare fact of an indictment is harmful whatever the outcome of the ultimate trial. Moreover, there is no basis in the record for a charge that the Attorney General was guilty of bad faith in summoning Helfant. *Cf. United States* v. *Devitt*, 499 F. 2d. 135, 140 (7 Cir. 1974). The only relevant part of the record in this connection is the Fifth Count of the indictment (A27-A33). There appears the testimony of Judge Moore's clerk to the effect that the judge ordered him to dismiss the complaint for atrocious assault and battery saying that the County Prosecutor had

consented to that course. The same count further notes that on October 25, 1972, Judge Moore swore before the grand jury that his clerk had lied and that he (Judge Moore) had nothing to do with the dismissal. To the contrary, Judge Moore testified that Judge Helfant was the culprit and that the latter's signature appeared on the withdrawal endorsement. Thus, the record starkly reveals that it was incumbent upon the grand jury to determine whether to indict Judge Moore or Judge Helfant or both. In light of the conflicting testimony then before the grand jury, it was fair, rather than oppressive, to summon Judge Helfant.

Third, this new allegation could not justify intervention by the federal judiciary. The focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court, and thus there could be no basis to assume that the State judiciary would not fairly adjudicate the issue.

Fourth, respondent's reliance on *United States* v. *Mandujano*, 496 F.2d 1050 (5 Cir. 1974) is grossly misplaced. Indeed, in light of the facts in *Mandujano*, we are at a complete loss to comprehend how respondent could contend that "the facts of Helfant's complaint bring it squarely within the four corners of the *United States* v. *Mandujano* . . . . (C.P. 30-34).[29] The gravamen of the Fifth Circuit's due process disposition in *Mandujano* was founded on the compelling factual predicate that defendant, a target of a grand jury investigation, was neither represented by counsel nor even apprised of his rights before the testimonial appearance which resulted in his indictment for perjury. Accordingly, it strains one's sensibilities to attempt to discern any resemblance between

[29] Respondent's cross-petition is designated C.P. and addendum A of the cross-petition is designated C.P.A.

the impecunious *Mandujano*, sans *Miranda* warnings and unrepresented by counsel because he could not afford one, and Helfant, a lawyer and judge (CPA24-19) represented by not one but two attorneys (CPA8-26), who was fully informed of his rights before testifying (CPA27-14). Presumably, the compelling ambience and exigencies of criminal litigation engender much wishful thinking.

Moreover, the alluring snippets of entrapment language upon which Helfant mistakenly relies are clearly inapposite. In *United States* v. *Nickels*, 502 F.2d 1173 (7 Cir. 1974), the Seventh Circuit in rejecting the due process-entrapment rationale of *Mandujano*, cogently explained that:

> "[E]ven if the questions were asked with the expectation of perjured answers, defendant cannot complain. This is not an entrapment case . . . It was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not 'so outrageous' as to bar prosecution. *United States* v. *Russell*, 411 U.S. 423, 431 . . ." *United States* v. *Nickels*, 502 F.2d at 1176.

More importantly, the limited defense of entrapment is not of constitutional dimension, *United States* v. *Russell*, 411 U.S. 423, 432 (1973), and would constitute a question of fact for the jury if litigated in a New Jersey forum. *State* v. *Dolce*, 41 N.J. 422, 432-33, 197 A.2d 185 (1964). Necessarily, the defense of entrapment would be far too weak and inappropriate a reed upon which to posit federal intervention in an ongoing state criminal prosecution.

Respondent proffers several other makeweight arguments and for the sake of completeness we will now dispose of them *seriatim*.

The cross-petition continues to urge that the Supreme Court violated the State and Federal Constitutions, by requesting the grand jury testimony and communicating with the Attorney General with regard to the status of the criminal investigation. We have already pointed out that the Supreme Court is charged by the State Constitution with the administration of the judicial system including the removal of judges and the discipline of attorneys. *Constitution of New Jersey,* Article 6, Section 6, paragraphs 2 and 3, and *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. See also, N.J. S.A. 2A:1B-1, *et seq.* We think it patently frivolous to say, as Helfant asserts here, that any constitutional concept bars this essential role. We note that the majority opinion nowhere indicated that it found any merit in that issue, for as already noted, the court below ordered intervention only with respect to the allegation that Helfant's will to plead the Fifth Amendment was overwhelmed.

As we noted earlier, no constitutional injury was presented by virtue of the Supreme Court's communications with the Attorney General. The allegations presented to the grand jury, if true, plainly justified the initiation of disciplinary proceedings against Judge Helfant, Judge Moore, or both. Surely, the Attorney General was duty-bound to apprise the Supreme Court of these serious charges. Petitioner's unsupported assertion to the contrary, the separation of powers doctrine is not offended when one branch of government cooperates with another.[30] Nor can a constitutional issue be generated by petitioner's naked assertion that there was "collusion" between the Supreme Court and the Attorney General. Surely, a litigant cannot precipitate federal intervention in a state criminal proceeding by the mere willingness to allege "collusion" or "corruption" or the like, and to rest that charge upon the mere fact that the Supreme Court took steps which are perfectly consistent with propriety and the discharge of its constitutional responsibility.

In this respect, we comment upon the footnote which appears at page 18 of the cross-petition. Helfant there says that the record does not contain proof of the communications between the Supreme Court and the Administrative Director. He further asserts that the record is barren of any evidence relating to the Supreme Court's practice of initiating disciplinary proceedings during the pendency of related criminal investigations. All of this

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[30] In point of fact, this Court has held that the Constitution's requirement that the federal government have a tripartite division has no applicability to the states. In *Dreyer* v. *Illinois,* 187 U.S. 71 (1902), the petitioner claimed that the Illinois law providing for indeterminate sentences was violative of the requirement of a separation of powers between governmental departments. The Court held that the federal Constitution did not require a division of powers in state governments and that whether a state constitution's separation of powers requirement was violated was not a federal question. This principle was reaffirmed in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 255 (1957), and has been consistently applied by the lower federal courts. See *e.g., Bennett* v. *California,* 406 F.2d 36 (9 Cir. 1969); *May* v. *Supreme Court of State of Colorado,* 374 F.Supp. 1210 (D.Col. 1974); *Puglia* v. *Cotter,* 333 F.Supp. 940 (D.Conn. 1971), aff'd 450 F.2d 1362 (2 Cir. 1971), *cert.* denied 405 U.S. 1073 (1972); *Salvaggia* v. *Cotter,* 324 F.Supp. 681 (D.Conn. 1971), aff'd 447 F.2d 1406 (2 Cir. 1971); *Avens* v. *Wright,* 320 F.Supp. 677 (W.D.Va. 1970), (three-judge court).

is a matter of record within the Supreme Court and as such may be judicially noticed. In point of fact, as we specifically noted in our petition, this practice has been recognized and approved by the Third Circuit. See *DeVita* v. *Sills*, 422 F.2d 1172 (3 Cir. 1970).[31] But even if this were not judicially noticed, it would not matter. It can be of no moment as to how the Supreme Court learned of the grand jury inquiry. Nor would it be significant if Judges Moore and Helfant were the only ones ever called into such a conference. It is perfectly sensible and reasonable to explore the possibility of an agreement not to sit pending resolution of criminal charges against a judge.

Petitioner also contends that the Supreme Court "deprived [him] of the right to counsel" (CP27-28). We do not know whether Helfant seeks to create the impression that the Supreme Court refused to permit counsel to attend the conference. If that is the thrust, then we point out that there is no such allegation in the complaint and nothing in the record to suggest a factual basis for such a charge. The right of a judge (or an attorney) to have counsel with him has never been denied, and Helfant nowhere says otherwise.

Finally, respondent's contention that the majority failed to consider his allegation of bad faith is equally unpersuasive. As already demonstrated, "bad faith" and "harassment" signify that a prosecution is being instituted with no reasonable hope or expectation of obtain-

[31] In a related context, this Court has held that civil and administrative hearings need not await the conclusion of related criminal charges. See *United States* v. *Kordel*, 397 U.S. 1 (1970). See also *United States* v. *Simon*, 373 F.2d 649 (2 Cir. 1967), *cert.* granted *Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425 (1967).

ing a valid conviction. In no sense does respondent's conclusory allegation of "bad faith" meet this standard. Moreover, Judge Moore's testimony, as set forth in the indictment which is a part of the record in this case, plainly reveals Helfant's involvement in a criminal enterprise. Indeed, respondent's own complaint sets forth the undisputed fact that other witnesses had appeared and had testified before the grand jury and, further that their "testimony if believed would incriminate" him (A64). Consequently, no triable issue was presented with respect to the allegation of bad faith.

CONCLUSION

For the foregoing reasons, petitioners submit that the judgment of the United States Court of Appeals for the Third Circuit be reversed in all respects.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT, EDWIN H. HELFANT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT, EDWIN H. HELFANT

Respondent, Edwin H. Helfant, submits this Reply Brief in response to the brief submitted by counsel for petitioners on December 30, 1974.

ARGUMENT

It is beyond refutation to say that the integrity of the appellate process rests upon the availability to the appellate court of a full and accurate record. *See, e.g., New York & Central Min. Syndicate & Co. v. Fraser,* 130 U.S. 611 (1889). It is the record made at the trial level that serves as the repository for those operative facts upon which the reviewing court depends to decide the particular case and, ultimately, fashion the rule of law. From the perspective of the appellate judge, a well-documented decision resting upon a full fact situation is strong, the rule of law emerging from the opinion vital and long-lived. Conversely, the opinion ill-grounded in fact, or based upon facts *dehors* the record most times is short-lived; it serves to build no rule of law of lasting vitality. *Cf., Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co.,* 199 U.S. 160 (1905).

The ultimate responsibility for building the record is upon the attorneys involved with the cause at the trial level. Diligent counsel strive to build a complete record. Experience has shown that trial counsel have argued at great length to include a single question and answer, or a particular exhibit, for these have oftentimes proven to be the crucial facts necessary to sustain the verdict or obtain the reversal. *See, New York & Central Min. Syndicate & Co. v. Fraser, supra.* Trial counsel's responsibility in this regard extends not only toward his client, but, as importantly, toward appellate counsel who shall have to brief and argue the appeal, and most importantly, to the appellate tribunal that shall have to review the judgment. The responsibility then falls upon appellate counsel to present to the appellate court a factual statement most favorable, of course, to his particular client's position. It

must, however, be well-grounded in the record below and fully cited to the particular pages in the transcript or record from which the facts are taken. It cannot be conjectural or speculative; nor can it contain facts *dehors* the record. A party is bound to see that the record is properly presented. *Redfield v. Parks,* 130 U.S. 623 (1889). A factual statement failing in this regard is subversive of the entire appellate process. *Chapman & Dewey Lumber Co. v. Bd. of Directors of St. Francis Levee Dist.,* 234 U.S. 667 (1914).

It is with these basic precepts in mind that we come to the facts of this case. Respondent herein (petitioner in No. 74-277) has repeatedly emphasized the procedural nature of this case, that it comes before the Court after a dismissal of the complaint for failure to state a cause of action upon which relief could be granted. *F.R.C.P.* 12(b)(6). The allegations of the complaint *must* be considered as true, and *all* inferences reasonably flowing from the complaint, or from the testimony taken in the district court, *must* be resolved in favor of respondent. *Hackett v. McGuire Bros.,* 445 F.2d 322 (3d Cir. 1971).

What is the record below? Basically, it is the complaint (App. 60),* the testimony taken in the district court (App. 69) and an affidavit of Samuel Moore, a now deceased co-defendant (App. 171). As respondent has so many times pointed out, the testimony taken was his and that of Patrick T. McGahn, Jr., one of his attorneys. This testimony was wholly and completely corroborative of respondent's complaint.

It was upon this record, of course, that respondent fashioned his petition for certiorari and brief in No. 74-277 and upon which he relies for his argument herein. He has been scrupulous to document each operative fact

* App. refers to the Joint Appendix.

with a reference to the record; he has studiously avoided making even the slightest reference to something *dehors* the record. He understands that something that has not properly been included in the record cannot be made a part of it by inserting it therein. *United States v. Taylor*, 147 U.S. 695 (1893). This has been in keeping with what he and his counsel have conceived to be their responsibility to this Court and to the institution of our legal system itself.

Conversely, the petitioners, through the offices of the Attorney General of the State of New Jersey, have presented, in both their petition for certiorari and brief, a factual complex completely at variance with the actual record in this case. It is not too much to say that their statement of facts is grounded in surmise and conjecture. As will be amply documented below, it is a statement resting entirely upon material facts *dehors* the record. It is a statement based upon a belief by petitioners of what the facts should be, rather than what was presented to the district court. *Cf., Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Johnson v. United States*, 225 U.S. 405 (1912) (the record cannot be contradicted by what counsel may file in a cause).

The key to petitioners' factual complex is their statement that the facts in this case were not in dispute and were "essentially a matter of *official* record."[1] Never have petitioners explained what is meant by "official record," nor have they supported their statement with any citation to any official source. More importantly, petitioners neither produced testimony in the district court about any "official record," nor asked the district court to take judicial notice of it. They also failed to produce any exhibits,

1. Pb11, emphasis added.

or even an affidavit.[2] Petitioners thus call upon this Court to officially notice some amorphous "official record," the existence of which has never been documented, nor even alluded to until this case was brought before this Court.

Petitioners then ask this Court to rely upon their "official record" as the basis for some very crucial facts. They assert that Helfant's appearance before the grand jury was brought to the attention of the New Jersey Supreme Court (Pb13). They further assert that in accordance with "settled practice" the Administrative Director of the Courts was directed to obtain a report of Helfant's grand jury appearance from petitioner-Hayden "and all relevant grand jury testimony." *(Ibid)*. Petitioners then assert that the purpose of the meeting was to discuss with Helfant and Moore, his co-defendant, whether they should sit pending resolution of the grand jury investigation (Pb14). They further assert that the procedure utilized by the court was not unusual, since the court often solicited the judge's or attorney's view as to whether he would consent to a "self-imposed" suspension (Pb21). A careful examination of this argument shows that this is based completely on facts *dehors* the record, and furthermore, is fraught with inconsistencies.

First, respondent has repeatedly stressed that petitioners have never documented under what "settled practice" the New Jersey Supreme Court is allowed to examine raw grand jury testimony and evidence, or to interrogate an attorney in a procedure completely at variance with the applicable rules and statutes concerning the disciplining of attorneys. This represents a glaring deficiency in

2. Certainly it would not have been burdensome to the New Jersey court structure to produce the Administrative Director of the Courts, or Deputy Attorney General Hayden. In fact, Mr. Hayden did not appear in the district court for any purpose on May 9, 1973.

the petitioners' case, stemming, no doubt, from their decision to present no proofs to the district court.

Secondly, petitioners' self-serving statement (Pb21) that the purpose of the meeting with Helfant was to determine if he intended to sit as a municipal court judge pending resolution of the criminal charges, is completely *dehors* the record and represents the rankest kind of speculation and conjecture. Later, they change the focus, by saying that the purpose was to determine if Helfant should sit pending the grand jury investigation (Pb26). Never have the petitioners presented any testimony or even an affidavit with regard to the purpose of the meeting. In reality, petitioners' statements represent only the unverified averments of counsel, not sworn testimony of the parties.

The actual record belies petitioners' bald statements about the nature of the meeting and illuminates the inconsistencies of petitioners' statements. Petitioners assert that the purpose of the meeting was to determine if Helfant should sit as a municipal court judge pending the disposition of his case. The grand jury investigation was not directed at these activities, however. They were concerned with his activities as a private attorney. *See, Helfant v. Kugler,* 500 F.2d 1188, 1198, n.7 (3d Cir. 1974).[3] Furthermore, if the court was interested only in Helfant's judicial position why was the first question of the Chief Justice about Helfant's thoughts regarding the right of a judge to invoke the Fifth Amendment (App. 86)? Why did the Chief Justice insist on receiving an answer to this question (App. 86)? Why did Justice Sullivan then immediately follow this with a question about whether Helfant thought it right to invoke the Fifth Amendment when he himself sat in judgment of other people (App. 86)? Finally, why was the latest question of the Chief Justice, "What do you intend to do today (App. 87)?" Is there not, at least, a strong inference arising from this testimony that the court was concerned not with Helfant's position as a judge, but rather his intentions regarding the Fifth Amendment?

3. Thus, the petitioners agreed that *N.J.S.A.* 2A:81-17.2a2, the New Jersey public employee immunity statute, did not apply to Helfant's situation. This is in direct contravention to petitioners' statement that the Supreme Court was duty-bound to inquire into allegations of *judicial* misconduct (Pb28). In essence, they have refuted the position they assumed before the Court of Appeals.

Furthermore, if the court was actually concerned with Helfant's judicial position, why did it choose to have the meeting ten minutes before a scheduled grand jury appearance, when, because of the obvious time limitation, there could not be free and extended discourse? In addition, if the court was truly interested in Helfant's judicial position, why did it only consider the *incomplete* grand jury minutes, which consisted of the testimony of three incarcerated criminals? Did not simple fairness require the court to at least allow until the entire investigation had been completed before taking this action, if indeed its true motive was directed toward Helfant's judicial position? Certainly, if the court was concerned with Helfant's judicial position, then why was it not interested in the merits (Pb16; App. 86)?[4] Could such a procedure comport with notions of fundamental fairness and due process of law?

4. In fact, the court did go into the merits with Helfant, and inquired about the Bar Mitzvah of Helfant's son and other matters currently being investigated by the grand jury (App. 86-87). Moreover, the court saw Samuel Moore, Helfant's co-defendant, immediately after Helfant left the chambers, examined the criminal complaint which was the State's main exhibit against Helfant, and discussed with Moore the validity of Helfant's signature on the complaint (App. 173-174). At the conclusion of this meeting, Moore left the chambers (App. 174). *He had not been asked about the Fifth Amendment since he had not resorted to it.* (App. 171-74). He *never discussed with the Supreme Court about leaving his judicial position* (App. 171-74). *Nothing in the record reflects such a conversation. Lastly, he never agreed, according to the record, not to sit pending the conclusion of the investigation* (App. 171-74). The petitioners' statements to this effect are simply unsupported speculation. *See,* Pb16.

Could such a procedure protect the New Jersey judicial system from public ridicule?[5]

Lastly, if the Fifth Amendment was not the focus of the meeting, if this was not evident to Helfant from the nature and tone of the questions (App. 87),[6] then why did he testify before the grand jury when it had been his absolute expressed intention not to testify on November 8, 1972 (App. 170)? Surely, at least the inference of a coercive purpose flows from the testimony. And, be that as it may, there is no obligation to prove such a purpose in a case arising under the Civil Rights Act, 42 U.S.C. §1983 (1970); *Bennett v. Gravelle,* 320 F. Supp. 203 (D. Md. 1971); *Baxter v. Birkins,* 314 F. Supp. 222 (D. Colo. 1970).

These inconsistencies and contradictions show the petitioners' statement of facts to be what it really is: a fictional account of what petitioners would have this Court believe, a fabricated figment of their imagination. Thus, the bad faith implicit in Helfant's state prosecution continues. Rather than face an evidentiary hearing and air the facts once and for all, petitioners have consistently sought, through whatever means possible, to forestall such a truth-seeking inquiry. Twice they were ordered to a hearing by the Court of Appeals and twice they sought to stay the mandate. They have complained about the passage of time (Pb70), but this has been caused by their unwillingness to go to an evidentiary hearing and their numerous motions to avoid this in the lower courts. They call the procedure utilized against Helfant as normal and in accordance with "settled practice," yet cannot give, nor

5. *Cf.*, Pb46 to Pb21 and 28. Again, if the court was interested in protecting the New Jersey court system from ridicule why was it not interested in the merits as petitioners have stated (Pb16).

6. Helfant testified that it was the tone of the Chief Justice's last question that convinced him the court would take action against him if he again resorted to the Fifth Amendment (App. 87).

have even attempted to give, one example of a similar occurrence. In each and every disciplinary case that has appeared before the court, formal disciplinary proceedings were instituted prior to the contact of the New Jersey Supreme Court with the involved individual. *See, e.g., In re Abrams,* 65 N.J. 172 (1974); *In re Colsey,* 63 N.J. 210 (1973); and especially *In re Blasi,* 64 N.J. 71, 73 (1973) in which the court came in contact with the attorney after a presentment has been submitted by the county ethics committee after the conclusion of criminal charges against the attorney. *Cf., Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

The petitioners claim that the *en banc* decision of the Court of Appeals "tears at the very roots of 'Our federation'" (Pb19). They claim that the decision is "officious and unjustified" (Pb26), has paralyzed the administration of a state judicial system and disrupted its criminal processes (Pb19). They further claim that the decision has seriously threatened the ability of the New Jersey Supreme Court to faithfully discharge its constitutional obligations (Pb26-27). These grandiose statements also cannot withstand close scrutiny. The criminal justice system has continued to function in New Jersey, unimpeded by the present case. The New Jersey Supreme Court has continued in its duties, part of which have been the discipline of attorneys. *See, In re Lanza,* 65 N.J. 347 (1974); *In re Abrams, supra; In re Colsey, supra; In re Blasi, supra.* No legitimate function has been paralyzed or seriously impaired.[7] What has been illuminated is perhaps the most extraordinary incident ever associated with the highest

7. Indeed, petitioners argue that three members of the court have since retired and thus Helfant need not face those same individuals whom he alleged were involved in the coercion; thus, they argue that his harm is not great and immediate. If that is so, and this is by no means conceded, then how can they argue that the administration of the "entire State judicial system (Pb26)" has been affected? How is the independence of the New Jersey Supreme Court threatened?

court of a state. It involves a gross abuse of power, a perversion of legitimate state functions. The record shows this and belies any contrary finding. It is a situation that cries out for immediate rectification by the federal courts, for the harm has been great and immediate and continues to the present day.[8]

With such basic and fundamental considerations at stake, we return to the basic thesis of this reply brief: the legitimacy of the appellate process. For, as the legitimacy of the state criminal processes has been called into question by the present case, the petitioners' structuring of their statement of facts has called into question the basis integrity of the appellate system.

As was said at the outset of this reply brief, the integrity of the entire appellate process depends upon a full and accurate record being placed before the appellate tribunal. It is counsel's responsibility to insure that this happens. An inaccurate or contrived factual statement simply cannot be the basis for an appellate decision, especially from the highest Court of our land. *Cf., Chessman v. Teets*, 350 U.S. 3 (1955). It is the duty of the prosecution in a criminal case to insure that only truthful evidence is brought before the trial court and this duty continues

8. Petitioners' reliance upon 28 U.S.C. §2254(d) (1970) is entirely misplaced (Pb71). As has been repeatedly stressed by respondent, the constitutional harm alleged is the inability *now* of the state courts to adequately protect his rights. There is no adequate state forum now. Federal habeas corpus in the future could not rectify what has happened to respondent's ability to adequately protect his interests presently.

Moreover, a strict prophylactic rule is necessary here. Federal habeas corpus, depending as it must on numerous state procedures, *Thomas v. Craven*, 473 F.2d 1235 (9th Cir. 1973); *United States ex rel. Thomas v. State of New Jersey*, 472 F.2d 735 (3rd Cir. 1973); *Leavitt v. Howard*, 462 F.2d 992 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972), could not strike at this heinous conduct with the force and power of an injunction.

throughout the appellate process.[9] The prosecution's knowing use of false testimony is misconduct upon which a dismissal of the charges could lie. *United States v. Heath*, 260 F.2d 623 (9th Cir. 1958); *United States v. Banks*, 374 F. Supp. 321 (D. S.D. 1974). "[S]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused." *United States v. McCord*, 43 U.S.L.W. 2257 (D.C. Cir., Dec. 12, 1974).

Legal niceties shall not serve to determine the present case.[10] They shall not serve to avoid the requirements of due process. Misstatements of fact shall not be allowed to disguise inconsistent arguments. Respondent's rights shall be vindicated when this Court grants him the relief requested.

9. The American Bar Association Standards on the Prosecution Function, section 5.6(b) is instructive:

> It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence or the testimony of witnesses.

The commentary to this section explains:

> It is so elementary that it hardly calls for comment that a prosecutor, in common with all other advocates, is barred from introducing evidence which he knows to be false. This obligation applies to evidence which bears on the credibility of a witness as well as to evidence on issues going directly to guilt. *Napue v. Illinois*, 360 U.S. 264 (1950). Even if false testimony is volunteered by the witness and takes the prosecutor by surprise rather than being solicited by him, if he knows it is false, his obligation is to see that it is corrected. *Ibid.; See, United States v. Poole*, 379 F.2d 645 (7th Cir. 1967).

10. *Cf.*, Pb43-72.

CONCLUSION

An examination of the actual facts of this case mandates the conclusion that respondent has suffered, and continues to suffer, great and immediate constitutional harm. Thus, this Court should permanently enjoin his state prosecution, or, in the alternative, remand this matter to the district court for further proceedings.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

v.

EDWIN H. HELFANT,

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IN THE

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GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

v.

EDWIN H. HELFANT,

Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners submit this Reply Brief in response to respondent's answering brief (mislabeled as a reply) and supplemental brief.

ARGUMENT

To place this reply in the proper perspective, a succinct review of both petitioners' and respondent's contentions is imperative. As petitioners demonstrated in their brief on the merits, the Court of Appeals' en banc decision virtually extirpated "Our Federalism." This terribly unfortunate and unjustifiable but still emendable result was based on the following encapsulated analysis.

The majority's opinion was bottomed on its unprecedented conclusion that the "extraordinary circumstances" exception enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971), constituted a viably distinct ground capable of supporting federal intervention in a pending state criminal prosecution. Assuming the existence of such a separate category, the Court of Appeals erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention.

Alternatively, if the majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims, the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the State Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that informal meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activi-

ties. Although respondent alleges that this fact is not in the record, it can plainly be inferred by virtue of the constitutional and statutory context within which the Supreme Court functions. As we have pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey, Article* 6, Section 2, paragraph 3; N.J.S.A. 2A:1B-1, *et seq.* The Court's duty to preserve the appearance as well as the existence of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to determine whether the public interest requires the interim suspension of a judge (or a lawyer). In that regard, it is not extraordinary to solicit the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions.[1] Further, it is a slur on the entire State judicial

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[1] Respondent's complaint is barren of any allegation that the procedure employed here was in any sense novel or unusual. Nothing has been presented which would indicate that the Supreme Court's preliminary inquiry was designed to compel respondent to testify. On the contrary, as the record plainly reveals, Judge Moore had previously waived his privilege and had appeared before the grand jury. Nevertheless, the Supreme Court interviewed him to determine whether an interim suspension was necessary on the same day that Helfant's conference took place. Moreover, both

(Footnote continued on following page)

system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a

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(Footnote continued from preceding page)

Helfant and Moore agreed to suspensions following their conferences with the Supreme Court despite the fact that each appeared and testified before the grand jury. These undisputed facts clearly rebut respondent's claim that he waived his Fifth Amendment privilege in order to preserve his status as a municipal court judge.

In any event, nothing in respondent's complaint reveals personal animus on the part of the members of the Supreme Court. This omission is extremely significant. The mere personal involvement of a judge in pretrial or ancillary proceedings does not, by itself, preclude him from fairly adjudicating the propriety of his own decisions. Judges are often required to review their own rulings. Post-trial applications, such as motions for a new trial or for a judgment notwithstanding the verdict, are examples of situations in which judges are required to review their own prior decisions. As we have previously noted, a judicially disciplined mind is able to remain impartial. Therefore, the allegations set forth in respondent's complaint do not support an inference that members of the Supreme Court cannot fairly adjudicate the issues raised in this case.

Equally unpersuasive is respondent's allegation that it was improper for the Attorney General to give the Supreme Court a copy of the grand jury minutes. As we have pointed out, the Supreme Court is duty-bound to initiate removal proceedings. Such a drastic step should not be taken on the basis of mere rumor or conjecture that a judge is unfit or incompetent. Constitutional safeguards are not offended when the Supreme Court requests and receives grand jury minutes in order to determine whether disciplinary proceedings should be commenced. The secrecy of grand jury proceedings is not sacrificed since the transcript is not made public.

proper forum for vindication of respondent's constitutional claim.[2]

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless

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[2] It is significant that only two of the six justices who attended the meeting with respondent are presently members of the New Jersey Supreme Court (Justice Sullivan and Justice Mountain). It is also noteworthy that only one of the two justices remaining on the Supreme Court was, in any sense, active in the interrogation of respondent. Further, it bears repeating that the present Chief Justice (Chief Justice Hughes) was not a member of the Supreme Court at the time of the meeting. Plainly, he has no interest in this matter and cannot be said to be biased against Helfant. This fact is critical since the Chief Justice, and not other members of the Supreme Court, is the "administrative head" of New Jersey's judicial system and is solely responsible for transferring judges from one assignment to another. *Constitution of New Jersey*, Article 6, Section VII, par. 1 and 2. Thus, even were we to assume that former Chief Justice Weintraub was biased against respondent and would have committed the crime of misconduct in office by using his judicial powers to insure Helfant's conviction, a grossly unwarranted assumption, the complaint here does not set forth a claim for which relief can be granted.

Not only has the composition of the Supreme Court changed, a new Attorney General was appointed in January 1974. Strange indeed is the fact that respondent has not sought to substitute the real parties in interest for those named in the complaint. In any event, it is clear that respondent's unsupported claim of bias and collusion cannot be said to taint the present Chief Justice, or the four recently appointed associate justices, or the present Attorney General or any of his assistants. See *Spomer* v. *Littleton*, —— U.S. ——, ——, 94 S.Ct. 685, 689-690 (1974). Therefore, no live controversy exists with respect to all of the

(Footnote continued on following page)

erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Fenner* v. *Boykin*, 271 U.S. 240 (1926).

It bears repeating that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. The equitable principle that harm must be imminent before an injunction or other form or relief will issue is an integral part of the doctrine of federal non-

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(Footnote continued from preceding page)

petitioners except Justice Mountain and Justice Sullivan. Under these circumstances, respondent has not shown that the purpose of an injunction (or in this case declaratory relief), which is to prevent future violations (see *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 (1953)), would be served in this case. Nor has he alleged facts disclosing that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep this case alive. See *Carroll* v. *President and Commissioners of Princess Anne, et al.*, 393 U.S. 175, 179 (1968); *Division 1287 of the Amalgamated Ass'n of Sheet, Electric Railway and Motor Employees* v. *Missouri*, 374 U.S. 74, 78 (1963). Rather, respondent's pleadings are nothing more than an "academic exercise in the conceivable." *United States* v. *Students Chal. Reg. Agcy. Pro. (SCRAP)*, 412 U.S. 669, 672 (1973).

intrusion.[3] Principles of comity and federalism dictate that only in the most extraordinary circumstances is a

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[3] As noted in our brief on the merits, Federal declaratory relief when a prosecution is pending in the state courts is generally inappropriate. See *Samuels* v. *Mackell*, 401 U.S. 68 (1971). In cases where the state criminal prosecution was begun prior to the federal suit, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment. . . ." *Id.* at 73. In unusual cases, "different considerations" may enter into a federal court's decisions as to declaratory relief, on the one hand, and injunctive relief on the other." *(Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967).) But, under the facts in this case, the metes and bounds of both remedies are coterminous.

In this case, a declaratory judgment would be as abrasive as the injunctive remedy for a variety of reasons. First, under 28 U.S.C. §2102, respondent could enforce a declaratory judgment by requesting an injunction and thus disrupt the State proceedings. See *Steffel* v. *Thompson*, —— U.S. ——, 94 S.Ct. 1209, 1221 (1974). Second, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty. *Ibid.* Third, if the parties would not be bound by the federal judgment, declaratory relief would encourage duplicative judicial proceedings. Fourth, declaratory relief would reflect negatively on the State's ability to enforce constitutional principles. Fifth, the evidentiary hearing and possible appeals emanating from the resulting declaratory judgment would greatly disrupt the State's criminal proceedings. Finally, since petitioners have stipulated that respondent's testimony will not be used in the State criminal trial, none of the parties must act at his peril in the future. Respondent is not relegated to the option of violating the law to test the constitutionality of a statute as is usually the case when declaratory relief is sought. See E. Borchard, *Declaratory Judgments*, x-xi (2d ed. 1941). So too, petitioners will not be forced to act at their peril in determining whether to admit respondent's testimony. No such dilemma is presented since all parties agree that New Jersey's rules of evidence would preclude the admission of such testimony in any event. Thus, the issuance of declaratory relief in this case would be contrary to the express purpose of the Federal Declaratory Judgment Act, which was to provide a less abrasive alternative to the injunction remedy.

federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic remedy of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Repondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

Succinctly stated, respondent has not shown that the State court system will ever be confronted with the problem of reviewing the conduct of the Supreme Court or its effect upon Helfant's mental processes. There was no allegation in the complaint of any conduct on the part of the Supreme Court which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are not dealing with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual does not necessarily render the procedure violative of due process. *Id.* at 467. Thus, no legitimate question as to coercion has been presented.

Even if there was a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U.S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U.S. 77, 82 (1968); *Bryson* v. *United States,* 396 U.S. 64 (1969); *Dennis* v. *United States,* 384 U.S. 855 (1966); *United States* v. *Kahriger,* 345 U.S. 22, 32 (1952). Assuming coercion, the compulsion was not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

Moreover, under federal constitutional law this Court has held that a witness who is in reality a target of a grand jury investigation can be compelled to testify unless the Court finds that his testimony would be directly inculpatory or provide a link in the chain of evidence that could lead to prosecution for past indiscretions. *Hoffman* v. *United States,* 341 U.S. 479, 485-87 (1951); *Malloy* v. *Hogen,* 378 U.S. 1, 11-14 (1964). In measuring a claim of privilege, this Court has promulgated the following standard:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not establish that hazard of incrimination. It is for the court to say whether his silence is justified, . . . and to require him to answer if it clearly appears to the court that he is mistaken. [*Hoffman* v. *United States,* 341 U.S. at 486, citations omitted]

Although New Jersey law permits a "target" witness to invoke the Fifth Amendment without requiring him to show that his claim is justified (see *In re Addonizio*, 53 N.J. 107, 117, 248 A.2d 531, 536 (1968)), such a witness may not refuse to testify for other nongermane reasons. In other words, a "target" witness in New Jersey may invoke the Fifth Amendment without explication. However, even in New Jersey, a witness who volunteers that his refusal to testify is based on other than valid Fifth Amendment considerations can be compelled to respond to a grand jury's question. A "target" witness cannot, for example, refuse to testify because he fears political retribution, social condemnation or financial injury. Accordingly, in light of Helfant's consummately exculpatory grand jury testimony and his assertion that his desire not to testify was based on reasons other than fear of self-incrimination, it is beyond cavil that respondent, as a grand jury witness, could have been compelled to so testify. Consequently, Helfant's assertion of a putative Fifth Amendment privilege to remain silent is plainly spurious.

Respondent's statements in his briefs make it abundantly clear that any assertion of the Fifth Amendment privilege would have been unwarranted. Respondent does not claim that his testimony before the grand jury was incriminatory or provided a link in the chain of evidence leading to his prosecution for past indiscretions. On the contrary, his testimony could only reflect negatively upon the institution of criminal charges against him. Rather, he claims that he did not wish to testify because other witnesses had previously testified against him and if his testimony were disbelieved by the grand jury, he could be indicted for false swearing. Distilled to its essence, respondent does not rely upon his Fifth Amendment privilege. His decision not to testify was tactical in nature and based upon his fear that the grand jury would not

find his testimony credible. Such a dilemma is always present when an interested party testifies in judicial proceedings.[4] In no sense does such a fear support invocation of the Fifth Amendment privilege.

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[4] Respondent's claim is couched in the verbiage of an "entrapment" defense. Specifically he contends that there was entrapment when the Attorney General summoned him before the grand jury. As we noted in our brief, this issue is not properly before this Court. The complaint did not make this allegation nor was such a charge advanced or accepted by either the district court or the Third Circuit. Further, we question both the validity of the Fifth Circuit's holding in *United States* v. *Mandujano*, 496 F.2d 1050 (5 Cir. 1974), heavily relied upon by respondent, and its applicability to the facts presented in this case. Here, the facts alleged in the complaint reveal in stark terms that the decision to subpoena respondent was made in good faith for purposes other than a desire to indict him for false swearing. As we noted in our brief, Judge Moore's testimony conflicted with that of his clerk. It was possible that this conflict could have been resolved by respondent's testimony. Further, as respondent concedes, other matters were before the grand jury (*i.e.*, the possible involvement of an Atlantic County judge in an unrelated transaction). In any event, we submit that *Mandujano* was erroneously decided and point to decisions in other circuits which have rejected the entrapment rationale. See, *e.g.*, *United States* v. *Nickels*, 502 F.2d 1173 (7 Cir. 1974). More importantly, the defense of entrapment is not of constitutional dimension, *United States* v. *Russell*, 411 U.S. 423, 432 (1973), and would constitute a question of fact for the jury if litigated in a New Jersey forum. See *State* v. *Dolce*, 41 N.J. 422, 197 A.2d 185 (1964). Thus, even if "contaminated" by virtue of the Supreme Court's involvement in Helfant's disciplinary proceedings, the State court system will never be confronted with having to resolve the issue. Finally, it is to be observed that the focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court. Thus, there is no reason to assume that the State judiciary cannot fairly adjudicate the issue. In any event, the respondent's claim would in no sense affect the substantive counts of the indictment. See *United States* v. *Mandujano, supra* at 1052.

With respect to the substantive charges, it must be repeated that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution and in fact, no harm at all. In short, his claimed Fifth Amendment violation is spurious and has no relevance to the State prosecution.

Helfant responded to the foregoing analysis with an effete and familiar panoply of arguments. Indeed, petitioners succeeded in anticipating and refuting them in their brief (Pb72 to 79). Four new makeweight contentions however, are worthy of mention because their elucidation reaffirms petitioners' position.

First, respondent, by eclectically editing Chief Justice Burger's concurring opinion in *Allee* v. *Medrano*, —— U.S. ——, 94 S.Ct. 2191 (1974), asserts that his factual analysis demonstrates "a breakdown of the State judicial system" constituting "extraordinary circumstances" and

warranting federal intervention in a pending State Court prosecution (Rb34 to 36).[5] Helfant, however, has failed to note that to satisfy the *Younger* test, the federal plaintiff must prove both bad faith and requisite injury; that is, he must unequivocally demonstrate deliberate bad faith action by the prosecutorial authorities, to unfairly deprive a person of a reasonable and adequate opportunity to make application in the state courts for vindication of his constitutional rights. *Allee* v. *Medrano*, 94 S.Ct. at 2210. Dispositively, as the court below found, there was no bad faith (Rb65). Absent the *sine qua non* of bad faith—the linchpin of federal intervention—Helfant's ill-founded contentions disintegrate.

Second, Helfant, in attempting to avoid the non-justiciable character of the coercion issue, analogizes his alleged Fifth Amendment injury to harm resulting from a Fourth Amendment violation (Ab58). What respondent chooses to ignore, however, is that the remedy for an unreasonable search and seizure is not federal intervention in an ongoing State prosecution (see *Stefanelli* v. *Minard*, 342 U.S. 117 (1951)), but exclusion of the tainted evidence. Accordingly, suppression of the allegedly coerced grand jury testimony at trial would provide respondent with a complete remedy. *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

Third, in a supplemental brief, Helfant, relying on the recent case of *Maness* v. *Meyers*, —— U.S. ——, 43 U.S. L.W. 4143 (1975), tries to circumvent the suppression remedy prescribed in *Blue* by arguing that "[w]hen he was coerced by the New Jersey Supreme Court to waive his Fifth Amendment privilege the cat was out of the bag" and that "nothing could undo this damage." (Sb4 to

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[5] Respondent's brief.

5).[6] Accordingly, petitioners are again constrained to note that Helfant's grand jury testimony was wholly non-incriminatory—neither feline freedom nor the need of undoing the undone is at issue in the case *sub judice*.

Finally, respondent has impugned the integrity of petitioners' appellate counsel in an answering brief improperly designated as a reply. In a purely *ad hominem* attack, redolent with self-righteous indignation, Helfant, without a scintilla of justification, has accused counsel for the State of prosecutorial misconduct in misrepresenting the factual basis of petitioners' position.

It bears repeating that Helfant conveniently ignored the unassailable fact that petitioners' factual analysis was predicated on the record below, judicially noticeable records and rules of the New Jersey Supreme Court, and ineluctable inferences which could be properly drawn therefrom. Apparently, any reasonable conclusion contrary to Helfant's confounded farrago of fallacies is automatically *de hors* the record.

In any event, respondent's unjustified attack would warrant no reply but for the undeniable fact that he has committed the very unethical gaucherie of which he accuses petitioners' counsel. Under these unpalatable circumstances, petitioners must reply.

As Helfant proudly proclaims in his answering brief,[7]

> What is the record below? Basically, it is the complaint, the testimony taken in the district court and an affidavit of Samuel Moore, a now deceased codefendant. [Rb3]

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[6] Respondent's supplemental brief.

[7] Respondent's reply brief.

Respondent's description seeks to avoid the painful fact that Samuel Moore's affidavit is not part of the record in this case. Helfant gratuitously foisted this document on petitioners via his Court of Appeals' brief. Although petitioners promptly moved to strike the affidavit, the court below never passed on the motion.

Nevertheless, the irrefragable fact remains that Helfant himself has succeeded in proffering factual material *de hors* the record. Yet respondent unjustifiably accuses petitioners of perpetrating the very malfeasance which he has consummated.

CONCLUSION

That part of the opinion of the United States Court of Appeals for the Third Circuit denying injunctive relief should be affirmed and the judgment permitting federal intervention and requiring a hearing and declaratory relief should be reversed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1974

[No. 74-80]

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Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

[No. 74-277]

EDWIN H. HELFANT,

Cross-Petitioner,

vs.

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Cross-Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

This supplemental brief is in response to this Court's opinion in *Huffman* v. *Pursue*, —— U.S. ——, 43 *U.S.L.W.* 4379 (1975), delivered on March 18, 1975, and received by petitioners this morning.

ARGUMENT

Perusal of this Court's opinion in *Huffman* v. *Pursue*, serves to reaffirm petitioners' contentions. In *Huffman*, this Court reached the novel conclusion[1] that the strictures of *Younger* v. *Harris*, 401 U.S. 37 (1971), proscribed

[1] This Court noted that the question was posed but not decided in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). There, this Court found it unnecessary to resolve the issue because the necessary predicate to application of the abstention doctrine—the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved—was lacking. Specifically, the appellees in *Gibson, supra*, had alleged and the district court had found, that the administrative process was so defective and inadequate as to deprive them of due process of law. This conclusion was based upon the undisputed fact that members of the administrative agency had prejudged the merits of the controversy before them and had adopted a position adverse to that advanced by the appellees. In point of fact, the State Board of Optometry had filed a complaint in the state courts against the appellees based upon allegations that they had engaged in "unprofessional conduct" which would justify revocation of their licenses. Having taken an adversary position, the Board had preconceived opinions with respect to the issues which it was required to resolve. So too, the district court concluded that members of the Board had a personal financial interest adverse to the appellees and were thus constitutionally disqualified for that reason. Significantly, this Court affirmed, but only on "the latter ground of possible personal interest." *Gibson* v. *Berryhill, supra* at 1698.

The facts in the instant case are in sharp and poignant contrast to those in *Gibson*. Here, respondent's allegations amount to nothing more than a charge that the New Jersey Supreme Court's official inquiry into whether disciplinary proceedings were to be conducted, pursuant to its constitutional and statutory mandate, served to compel him to testify. The complaint is barren of any allegation of personal animus, vindictiveness, bias or pecuniary interest on the part of the present members of the Supreme Court sufficient to require disqualification.

federal intervention under 42 U.S.C. §1983 in an ongoing state civil proceeding to test the constitutionality of a state nuisance statute on First Amendment grounds. Observing that actions under the contested statute were "more akin to a criminal prosecution than are most civil cases," this Court noted that federal intervention in the form of either injunctive or declaratory relief was manifestly inappropriate.

Relevant to the present inquiry was this Court's holding that exhaustion of state appellate remedies is a prerequisite to the exercise of federal equitable jurisdiction. Significantly, the exhaustion doctrine was considered applicable despite the appellee's claim that resort to Ohio's appellate courts would be "futile." As this Court aptly observed "considerations of comity and federalism which underlie *Younger*, permit no truncation of the exhaustion requirement merely because [a] party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *Huffman* v. *Pursue, supra* at 4385. Simply stated, this Court was unwilling to adopt a rule based upon "an assumption that state judges will not be faithful to their constitutional responsibilities."

These principles apply with greater force in this case. The Court of Appeals opinion constitutes an affront to the dignity of the entire State court system. It is predicated upon a prediction that members of New Jersey's judiciary will not obey the law they are bound to enforce. Simply stated, there is no reason to assume that members of the State's highest court will be so vindictive as to seek to ensure respondent's conviction.

CONCLUSION

That part of the opinion of the United States Court of Appeals for the Third Circuit denying injunctive relief should be affirmed and the judgment permitting federal intervention and requiring a hearing and declaratory relief should be reversed.

Respectfully submitted,

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